IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-261

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AFL-CIO,

and

AMERICAN GUILD OF VARIETY ARTISTS, *Petitioners,*

v.

HARRAH'S CLUB, INC.,

and

NATIONAL LABOR RELATIONS BOARD, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioners, American Federation of Musicians of the United States and Canada, AFL-CIO, and American Guild of Variety Artists, respectfully pray that a writ of certiorari issue to review the judgment and opinion rendered in this proceeding on March 25,

1971, by the United States Court of Appeals for the Ninth Circuit, as amended on rehearing on April 26, 1971.[1]

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported. It is reprinted in Appendix A hereto, p. 1a, *infra.*

The findings of fact, conclusions of law and orders of the National Labor Relations Board, which were reviewed by the Ninth Circuit, are reported at 176 N.L.R.B. No. 77 and 178 N.L.R.B. No. 115; they are reprinted in Appendix B hereto, p. 18a and p. 39a, *infra.*

JURISDICTION

The petitioner labor unions, the prevailing parties in the proceedings before the National Labor Relations Board, were allowed to intervene as parties in the appeal proceedings in the Ninth Circuit. The petitioners thus have standing to file this petition for certiorari. *United Auto Workers* v. *Scofield,* 382 U.S. 205, 214 (1965).

The opinion of the Ninth Circuit was issued on March 25, 1971. On April 26, 1971, pursuant to a petition for rehearing filed by respondent Harrah's Club, Inc., the court entered an order amending its opinion. See p. 17a, *infra.* On June 15, 1971, Mr. Justice Douglas signed an order, on timely application

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[1] In its opinion, the Ninth Circuit decided three consolidated appeals. In Nos. 24,553 and 24,607, the court granted petitions to review the Labor Board's opinion and order reported at 176 N.L.R.B. No. 77. In No. 25,007 the Ninth Circuit granted a petition to review the Labor Board's opinion and order reported at 178 N.L.R.B. No. 115. All of the matters resolved by the Ninth Circuit in the three consolidated appeals are encompassed by this petition.

by the petitioners, extending the time for filing this petition for writ of certiorari to and including August 21, 1971.[2]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether unions violate § 8(b)(4)(B) of the National Labor Relations Act, as amended, by sending telegrams and other notices to members who are allegedly secondary employers or employees requiring them not to perform services aiding the normal operations of a lawfully struck employer at the struck premises.

2. Whether § 8(b)(4)(B) of the National Labor Relations Act, as amended, if interpreted to prohibit the sending of telegrams and notices in such circumstances, violates the free speech guarantee of the First Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(i) & (ii)(B):

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * *

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[2] On June 12, 1971, Mr. Justice Douglas signed an order extending to and including August 21, 1971, the time for filing a petition for writ of certiorari on behalf of the National Labor Relations Board. The Solicitor General decided not to file such a petition.

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * *

(B) forcing or requiring any person to cease handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided,* That nothing contained in this clause, (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . .

STATEMENT OF THE CASE

A. The Strike

On March 1, 1968, musicians employed by a group of gambling casinos in Reno, Nevada, struck their employers because the latter refused to bargain over wages with the employees' representative, Local 368 of the American Federation of Musicians. In furtherance of that strike, picket lines were established and the assistance of the parent union (Petitioner American Federation of Musicians)[3] and other unions was sought. All AFM members (including some who were deemed by the court below to be independent con-

[3] Hereinafter "AFM".

tractors and the employees of those independent contractors) were informed by letters, telegrams and other written notices that they were not to perform at the struck casinos and not to cross the picket lines.[4] It was stipulated that the musicians were told not to perform only at the struck casinos and that the players were not asked to refrain from performing at any other location.

Petitioner American Guild of Variety Artists,[5] which represented entertainers other than musicians performing at the clubs, sent telegrams to a number of its members who were scheduled to appear at the struck casinos requesting that they support the AFM strike by honoring the musicians' picket lines. The telegrams (see p. 2a, n. 1, *infra*) recited that such observance was required under the union constitution.

B. The Board's Decisions

Complaints were filed against both unions alleging that they had violated § 8(b)(4)(i)&(ii)(B) of the National Labor Relations Act by sending telegrams to their members requiring them to honor the picket lines.[6] After appropriate proceedings, and in express reliance upon this Court's decisions in *Electrical Workers* v. *N.L.R.B., (General Electric)*, 366 U.S. 667 (1961), and *United Steelworkers* v. *N.L.R.B., (Carrier)*, 376 U.S. 492 (1964), the Board issued unanimous decisions dismissing the complaints. The Board found that the telegrams sought to prevent the performance of work

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[4] Failure to heed those instructions could subject a member to disciplinary proceedings. See Appendix A, p. 3a, n. 2, *infra*.

[5] Hereinafter "AGVA".

[6] The complaints did not allege that the work stoppage or the picketing at the casinos violated the Act.

which "contributed to the operations which the strike was endeavoring to halt [and] . . . . in fact were directly related to the normal operations of the casinos . . . ." (Appendix B, pp. 21a-22a, *infra*).[7] Accordingly, it concluded that the challenged conduct constituted lawful primary activity outside the scope of Section 8(b)(4)(ii)(B). See Appendix B, p. 18a and p. 39a, *infra*.

C. The Ninth Circuit's Decision

Upon petitions to review, the Court of Appeals for the Ninth Circuit reversed the Board. Although it left the Board's findings of fact substantially intact,[8] the Ninth Circuit held that the telegrams requiring members to observe picket lines constituted "threats, coercion and restraint" addressed to employers other than the casinos and thus ran afoul of the literal language of the statute. (See Appendix A, p. 11a, *infra*.). In the court's view, "whether the respondent . . . [petitioners herein] could have done the same thing or not at the picket line itself in reliance upon the proviso is beyond the issues of this case." And, the court concluded, since the picketing had not been challenged,

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[7] The record shows that the musical and other entertainment provided by the casinos attract patrons into the establishments where they purchase food and drink and gamble, thus providing revenue to the casinos (Tr. 111, 142-44, 177, 216-17, 370). The Board made similar findings in another case wherein it found that the clubs, not the orchestra leaders, employed the musicians. *Reno Musicians Local 368*, 170 NLRB No. 56, Slip op. p. 3 (decided March 12, 1968).

[8] The Board found it unnecessary to decide whether certain musicians who had been directed not to perform at Harrah's Club were independent contractors or employees of the Club. The Ninth Circuit held that they were independent contractors. See Appendix A, p. 16a, *infra*.

this Court's decisions in *General Electric* and *Carrier* were inapplicable.[9] See Appendix A, p. 1a, *infra*.

REASONS FOR GRANTING THE WRIT

The decision of the court below warrants review because it is in conflict with principles announced in controlling decisions of this Court, the decisions of three other courts of appeals on the precise issues herein and with the repeated holdings of the National Labor Relations Board. Furthermore, the opinion will, if permitted to stand, have widespread, immediate and adverse impact upon the right to strike as that right has traditionally been interpreted and as it has been expressly safeguarded by § 13 of the Act. Finally, the decision construes the statute in such a way that it violates the First Amendment to the Constitution.

1. The Decision Below Conflicts With the Principles Established in Controlling Decisions of This Court

The Ninth Circuit has held that the telegrams' implicit and explicit threats of union discipline in the event members performed at the struck casinos were unlawful because they were directed to "secondary" employers (and, presumably, their employees), rather than to the casinos, who were the "primary" employers. See pp. 11a, 13a, *infra*. But this Court has held that attempts to prevent secondary employers (and their employees) from performing work at struck premises

[9] The Ninth Circuit's original opinion dealt exclusively with the charge that the telegrams sent to alleged independent contractors constituted "threats" within the meaning of § 8(b)(4)(ii)(B). Upon petition for rehearing Harrah's Club pointed out that the AFM had also communicated with alleged secondary employees. The Ninth Circuit then amended its order to provide that such conduct constituted illegal "inducement" under § 8(b)(4)(i)(B). Appendix A, p. 17a, *infra*.

in aid of the primary employer's "normal operations" is lawful, traditional primary activity. In *Electrical Workers* v. *N.L.R.B.,* 366 U.S. 667 (1961) (hereinafter referred to as *General Electric*), this Court unanimously protected the "traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations." 366 U.S. at 681. Though picketing was the means of the appeal in that case, this Court made clear that "[t]he key to the problem is found in the type of work that is being performed" by those to whom the appeal is addressed. 366 U.S. at 680. In *United Steelworkers* v. *N.L.R.B.,* 376 U.S. 492, 497-498 (1964) (hereinafter referred to as *Carrier),* this Court, again unanimously, reaffirmed its holding in *General Electric:*

> *"The legality of separate gate picketing depended upon the type of work being done by the employees* who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was unrelated to the day-to-day operation of the employer's plant, the picketing was an unfair labor practice." (Emphasis supplied).

And, in *Railroad Trainmen* v. *Terminal Co.,* 394 U.S. 369 (1969), this Court once more declared that appeals to "other employers and their employees" were lawful where their mission aids the normal operations of the struck employer. 394 U.S. at 388. Thus, on three occasions, this Court has held in the clearest manner that union appeals to secondary employers and employees not to perform services in aid of the struck employer's normal operations were lawful, "primary" activity. In these cases, the lawfulness of the union's conduct depended upon the work sought to be halted,

and not upon the locus of the appeal or whether the "secondary" employer was an independent contractor. *General Electric, supra,* 366 U.S. at 680; *Carrier, supra,* 376 U.S. at 499; *Railroad Trainmen* v. *Terminal Co., supra,* 394 U.S. at 388-89.

Instead of following this Court's decisions holding that § 8(b)(4) cannot be read literally, and that the statute outlaws only "secondary boycotts," *General Electric, supra,* 366 U.S. at 672-74, the Ninth Circuit characterized the telegrams as "threats" addressed to secondary employers and therefore, without more, unlawful. Subsequently, upon petition for rehearing, the Court ineluctably held unlawful the telegraphed appeals to employees. See p. 7, n. 9, *supra.* Petitioners did not oppose the petition for rehearing, since the statute on its face makes "inducements" of secondary employees and "threats" to secondary employers equally unlawful *if* the union's *object* is unlawful. But conversely, if the union's object is lawful, as this Court has held and the statute makes equally plain, threats and inducements—even violent threats and inducements—do *not* violate § 8(b)(4). *Carrier, supra,* 376 U.S. at 501-02; *Labor Board* v. *Rice Milling,* 341 U.S. 665, 672 (1951). Stated differently, no matter what the union's means, if its objective is not to effect a secondary boycott, its conduct does not fall within the statutory prohibition. *National Woodwork Mfrs.* v. *N.L.R.B.,* 386 U.S. 612, 620-30 (1967). Here, as established by the undisputed finding of the Board, the union's object was "primary", *i.e.,* to prevent the performance of work aiding the normal operations of the struck employer to be performed at its premises.

The Ninth Circuit felt free to disregard the critical inquiry into the unions' object because the threats

and inducements were made away from the picket line, *i.e.*, by telegram. But so myopically to restrict inquiry to the locus of a union's conduct is, we submit, to ignore the whole history of the secondary boycott prohibition—as well as the decided cases. See *Carrier, supra,* 376 U.S. at 499-500; *N.L.R.B.* v. *Fruit Packers Local,* 377 U.S. 58 (1964).[10] See generally *General Electric, supra,* 366 U.S. at 674. Quite obviously, where the objective facts unambiguously show a lawful, primary object (*i.e.*, to stop the performance of work aiding the normal operations of the employer) that object remains the same no matter where the challenged "threat" or "inducement" takes place.[11] And it is perfectly plain that both the means and the object sought by the union must be those embraced by

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[10] In *Fruit Packers, supra,* all the consumer picketing in question occurred at the premises of a secondary employer, as this Court expressly noted. 377 U.S. at 72. But the Court held that the picketing was lawful because it was addressed solely to the products of the *struck* employer, *i.e.*, it was "primary" picketing. An appeal for a broader economic sanction against the "neutral" retailer would have fallen beneath the statutory ban because of the degree of involvement of the "neutral" employer. *Id.* at 70, 72. That determination is analogous to our position here: locus cannot be controlling, if the appeal and its foreseeable effect are, as they were here, sufficiently narrow.

[11] Thus, the authoritative treatise prepared by the American Bar Association correctly notes,

> Attempting to reconcile the broad prohibition of Section 8(b)(4) with the specific protections of strikes and other concerted activity which the Act guarantees, the Supreme Court has focused on the *nature of the work* involved in the primary dispute *rather than upon the physical location* of the inducement. *Inducement or encouragement to withhold services directed at those who normally deal with the work in dispute is deemed primary.*

The Developing Labor Law 624, Section of Labor Relations Law, ABA (1971); emphasis added.

the statute before a violation can be found. Accordingly the decision below is not only wrong but in plain conflict with this Court's opinions construing § 8(b)(4)(B). Certiorari should be granted to correct this egregious error and resolve the conflict.[12]

2. The Decision Below Conflicts With Decisions of Other Circuits and With Authoritative Labor Board Determinations

The decision of the court below that by sending telegrams and other forms of notice requiring employer and employee members not to perform work aiding the normal operations of the struck employer on his premises petitioners violated the Act is in conflict with decisions of the Courts of Appeals of the District of Columbia, Fourth and Seventh Circuits, and with numerous authoritative Board cases. Thus in *Teamsters Local 175* v. *N.L.R.B.*, 294 F.2d 261 (D.C. Cir. 1961), the District of Columbia Circuit held that neither picketing nor non-situs appeals to secondary employees of neutral trucking concerns asking them not to make deliveries to the struck premises were unlawful. The court there held that ". . . peaceful

[12] The propriety of granting certiorari here is accentuated because the ruling below contravenes the express Congressional ratification in 1959 of the Labor Board's earlier conclusions regarding lawful traditional primary activity, which, as shown *infra*, pp. 12-14, were that the same conduct at issue here was lawful, primary activity. This Court has held that Congress, in its intensive review of the decisional framework during the consideration of the Landrum-Griffin amendments, made clear that what the Board had declared "traditional primary activity" was to remain outside the scope of § 8(b)(4). *Woodwork Manufacturers* v. *N.L.R.B.*, 386 U.S. 612, 632-33 (1967). For that reason the rejection by the Ninth Circuit of what the Board described as the "established principle", 34th NLRB ANN. REP. 104 (1969), involved in this case is of special significance. The court below has branded "unlawful" conduct Congress was at pains to protect.

primary picketing and its normal incidents, including requests to neutrals not to cross the picket lines, cannot be forbidden . . . ." 294 F.2d at 262. Similarly, the Seventh Circuit upheld the Board's dismissal of a complaint despite evidence that "(m)embers of Local 200 who were employees of carriers which customarily served the Company, were instructed by officers of Local 200 not to go through the picket line at the Milwaukee plant." *Milwaukee Plywood Co.* v. *N.L.R.B.*, 285 F. 2d 325, 326 (7th Cir. 1960). And, in *N.L.R.B.* v. *International Longshoremen's Association*, 332 F. 2d 992 (4th Cir. 1964), the Fourth Circuit held that union refusals to supply workers to a secondary employer for work on a blacklisted ship were lawful even in the *absence* of a primary picket line. Like the telegrams here, the challenged union conduct in these cases did not occur at the picket line.

The Board held in its earliest cases construing § 8 (b)(4) and repeatedly thereafter that appeals to secondaries by letter or otherwise did not violate the statute where they called for action only at the situs of the dispute, since such conduct had a primary objective. The first and leading case was *Oil Workers, Local 346 (The Pure Oil Company)*, 84 NLRB 315 (hereinafter referred to as "Pure Oil").[13] In *Pure Oil*, the Board held that both the union's picketing of the premises of the struck employer and its "hot cargo" letters to other unions asking secondary employees not to perform services for the struck employer were

[13] This Court has recognized the importance of *Pure Oil* in the development of secondary boycott law. See *General Electric, supra*, 366 U.S. at 675.

lawful, primary activity. The Board wrote, 84 NLRB at 319:

> Like the picketing of the dock, therefore, the Union's letters must be viewed as an integral part of its lawful right to take primary action in support of its demands on Standard Oil, and to publicize this action. The appeals contained in the letters, no less than the appeals inherent in the picketing of the dock and in the signs which were posted adjacent to the picket line, thus amounted to nothing more than a request to respect a primary picket line at the Employer's premises. This is traditional primary strike action. Accordingly, we conclude that none of the Union's actions herein were violative of Section 8(b)(4)(A).

In the celebrated case of *Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547, the Board reiterated its holding in *Pure Oil*.[14] There, the union, in addition to picketing, made repeated oral and written requests to secondary employees and their unions not to perform services benefitting the struck employer. The Board concluded that § 8(b)(4) had not been violated, holding,

> We agree with the Trial Examiner that the Respondent's other activities, its 'hot' letters and appeals for cooperation to Moore Employees and other unions, invited action only at the *situs* of dispute. Therefore under the holding in the *Pure Oil* case, they must be considered as primary action. Accordingly, we shall dismiss the complaint in its entirety. 92 NLRB at 551-552.

In a host of other cases the Board has held that oral and written appeals made at places other than the

[14] See this Court's discussion of *Moore Dry Dock* in *General Electric, supra*, 366 U.S. at 677.

primary situs are lawful so long as they call for a refusal to perform services solely at the premise of the primary employer. *Newspaper and Mail Delivery Union (Interborough News Company)*, 90 NLRB 2135, 2149-2150; *Teamsters Local 807 (Schultz Refrigerated Services, Inc.)*, 87 NLRB 502, 505; *Milwaukee Plywood*, 126 NLRB 650; *International Organization of of Masters, Mates & Pilots (Chicago Calumet Stevedoring Co.)*, 125 NLRB 113, 114, n. 1.

The decision below conflicts with these well established Board and court of appeals' precedents. Although petitioners believe that this Court's prior decisions dictate affirmance of the Board's orders here, and that the prior cases in the other Circuits and before the Labor Board were rightly decided, this Court has not had an occasion to rule precisely upon the application of the principles enunciated in *General Electric, Carrier* and *Railroad Trainmen* to "threats" and "inducements" of the type here involved made away from the situs of the primary dispute. Consequently, if the decision below is allowed to stand, the viability of the earlier decisions of the Board and the other Circuits will be cast in doubt. Certiorari should be granted now to preclude the development of so unsatisfactory a situation in national labor relations.

3. The Decision Below, If Allowed To Stand, Will Have a Widespread, Immediate and Adverse Impact

Review is necessary because the decision of the court below, if permitted to stand, will have widespread, immediate and adverse impact upon employees, employers, and the right to strike expressly protected by § 13 of the Act. This Court has held that § 13 of the Act "made it clear that § 8(b)(4), and all other parts

of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment or diminution is 'specifically provided for' in the Act." *National Labor Relations Board* v. *Rice Milling Co.*, 341 U.S. 665, 673 (1951). See also *Labor Board* v. *Drivers Union*, 362 U.S. 274, 281-282 (1960).

Necessarily, a union that has established a lawful primary picket line will, as the AFM did here, attempt to communicate that fact to its members and to the members of other unions who may be expected to perform work at the situs of the dispute aiding the normal operations of the employer. That communication is especially important in the entertainment field where members, whether employees or employers, often travel hundreds or thousands of miles from one job to another and where accepting an engagement at one place often entails refusing employment elsewhere. Fairness to these members as well as the union's right to conduct an effective strike dictate that such notification be permitted away from the picket line, *before* members make substantial investments of time and money which they cannot recoup unless they aid the normal operations of the struck employer. Hence, the decision below has a significant, practical, and deleterious impact.

Similarly, unless the decision below is reversed unions will no longer be permitted to advise truck drivers, or any other workers "approaching the situs" to perform work at the struck premises, that they will encounter a picket line upon arrival. Nor will they be permitted to lessen the impact of a strike upon "neutral" employers by warning them that their em-

ployees will be asked not to cross a lawful picket line if they are sent to the situs of a dispute.[15]

The decision will also have devastating impact upon the modes of communications to their members typically utilized by sister unions and federations of unions such as state federations and city central labor unions. Generally, a union involved in a primary dispute will advise both the local federation of unions and other unions whose members are likely to be affected by the dispute. The federation then communicates that fact throughout the local labor movement, notifying all employees that a picket line has been established and that it should be observed. Only rarely will the federation or other unions become involved in picketing themselves. Under the decision of the court below, however, these long-standing practices will be struck down. Thus, the practical consequences of the ruling are extensive since it outlaws union activity that has long been recognized as an "integral part of [a union's] . . . lawful right to take primary action in support of its demands . . . and to publicize this action." *Pure Oil, supra.*

Furthermore, the impact of the ruling below will be immediate and decisive. The institutional framework of the Act is such that countless matters will be resolved on the basis of this decision and never be reviewed by the Board or the courts. For, as a leading commentator on this subject has pointed out, the mandatory injunction requirement of § 10(1) of the Act means that " . . . the crucial actions in any particular case are not the Board's decision to issue a cease and desist order or to dismiss the complaint but the regional director's decision whether there is rea-

[15] See text at p. 9, *supra.*

sonable cause to believe . . . that a complaint should issue." Lesnick, *The Gravamen of the Secondary Boycott,* 62 Col. L. Rev. 1363, 1407. Having found reasonable cause, the regional director is mandatorily required to seek a temporary injunction. As Professor Lesnick points out, "To the parties, the case is largely won or lost at this stage." *Ibid.*[16] For it is the tendency of the district courts, in Professor Lesnick's phrase, to "go along with the regional director's position." This means that the union will be stripped of effectiveness in the particular labor dispute. Subsequent review is of little practical significance and the enjoined union will rarely undergo the expense of litigation on a question that is realistically moot.

There is further evidence of the importance of this decision in the administration of the Act. As the Court is aware, the Labor Board requested the Solicitor General to apply for certiorari. Application of National Labor Relations Board for an Extension of Time Within Which to File a Petition for a Writ of Certiorari, p. 2 (on file in Office of the Clerk). We are advised that, although agreeing with the Board that the decision is erroneous, the Solicitor General has rejected the Board's request that a petition for certiorari be filed on its behalf. Whatever the reasons for this decision, it is plain that the agency responsible for and most familiar with the administration of the Act believes that review by this Court is necessary.[17]

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[16] The decisive finality of what is technically characterized as a temporary injunction in labor disputes has been fully recognized since enactment of the Norris- La Guardia Act.

[17] The same situation occurred in *United Steelworkers* v. *N.L.R.B.*, 376 U.S. 492 (1964), in which this Court granted the union's petition and reversed unanimously. See *United Auto Workers* v. *Scofield*, 382 U.S. 205, 214 (1965).

These considerations, we submit, demonstrate the importance of the erroneous decision below, and establish the need for the grant of certiorari sought here.

4. The Decision Below Construes § 8(b)(4)(B) in Such a Way as To Raise a Critical Question as to Its Consistency With the First Amendment

By predicating illegality on the fact that the unions sent telegrams calling for observance of an admittedly lawful picket line, the Ninth Circuit's construction of § 8(b)(4)(B) renders it unconstitutional. In short, as construed, the statute violates the guarantees of the First Amendment. The First Amendment does not permit basing legality on the *method* of peaceful communication chosen. So long as the communication is peaceful and does not call for conduct that is itself unlawful, it may be made by telegram, picket line or any other "means of conveying information." *Carlson* v. *California*, 310 U.S. 106, 112 (1940). Since unions have the unquestioned right to appeal to secondaries not to enter the struck premises by means of the picket line, the First Amendment protects their right to make the identical appeal by telegram as well.

It has been undisputed since this Court's decision in *Thornhill* v. *Alabama*, 310 U.S. 88 (1940), that "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution . . . ." 310 U.S. at 102. As was held in *Carlson* v. *California, supra*, 310 U.S. at 112:

> The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. For the reasons set forth in our opinion in *Thornhill* v. *Alabama, supra*, publi-

> cizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state.

Communications similar to those involved here have been described by the Labor Board as the "traditional means of conveying to fellow workers and to the public at large the fact that a labor dispute exists . . . ." *Oil Workers International Union, Local 346 (Pure Oil),* 84 NLRB 315, 318. There the Board's Trial Examiner concluded, on the authority of *Thornhill* v. *Alabama, supra,* that the sending of "hot cargo" letters similar to the telegrams involved here "were forms of speech protected by the United States Constitution." 84 NLRB at 311.

This Court has been acutely sensitive to the First Amendment ramifications of union conduct in this area. Thus, in *Labor Board* v. *Fruit Packers Local,* 377 U.S. 58 (1964), the majority reiterated its "concern that a broad ban against peaceful picketing might collide with the guarantees of the First Amendment." 377 U.S. at 63. In view of that concern, the Court concluded that § 8(b)(4) did not reflect "with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites . . ." and reversed the Board's finding that the Act had been violated.

Mr. Justice Black, concurring in *Fruit Packers,* concluded that Congress did intend to forbid such picketing but that such regulation abridged freedom of

speech and press in violation of the First Amendment. 377 U.S. at 76. The central point of his analysis applies with special force here. For here, as in *Fruit Packers,* the union is not "asking others to do something unlawful . . . ." The message conveyed by the telegrams was the same as that conveyed by the pickets themselves and was similarly lawful. If a peaceful communication does not seek to bring about conduct that is substantively evil, its free exercise is mandated by the First Amendment.

The manner of communication may be improper, *e.g.,* the breach of public order by pickets, and lose the protection of the First Amendment for that reason. But that is not the case here. Telegrams are pure speech. And since this Court has held that unions have the lawful right to discipline their members for strike-breaking, *N.L.R.B.* v. *Allis-Chalmers,* 388 U.S. 175 (1967), the fact that the telegrams here referred to union constitutional provisions similar to those involved in *Allis-Chalmers* is of no consequence. First Amendment rights may not be disregarded, as in the ruling below, by characterizing as "threats" statements of intention to take lawful action. *Cf. Organization For a Better Austin* v. *Keefe,* 402 U.S. 415 (1971). Indeed, since the Court below concluded that the telegrams constituted illegal "inducements" as well as "threats", see p. 9, *supra,* it would have held the telegrams unlawful even if the unions had not referred to their lawful rights to discipline members for crossing a picket line.

These constitutional questions, of course, can be avoided only if this Court now holds that the Ninth Circuit's reading of § 8(b)(4)(B) is impermissible as a matter of statutory construction.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 24,553

HARRAH'S CLUB, a corporation, *Petitioner-Appellant,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent-Appellee.*

No. 24,607

CHARLES PETERSON, *Petitioner-Appellant,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent-Appellee.*

No. 25,007

HARRAH'S CLUB, a corporation, *Petitioner-Appellant,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent-Appellee.*

[March 25, 1971]

On Petition to Review an Order of the
National Labor Relations Board

Before: HAMLEY, JERTBERG and TRASK, Circuit Judges.

TRASK, Circuit Judge:

This is a consolidated appeal arising from three separate petitions to review and set aside orders of the NLRB that dismissed complaints against three unions charging them with unfair labor practices in violation of 29 U.S.C. § 158(b)(4). No question of the Board's jurisdiction is raised and we find none. A separate statement of facts will be given where helpful to an understanding of the issues.

Nos. 24,553 and 24,607

The American Federation of Musicians, AFL-CIO (hereafter AFM), and the Reno Musicians Protective Association Local 368 had a labor dispute and a strike at Harrah's Club and Sparks Nugget and other hotels in the Reno, Nevada, area between March 1 and April 30, 1968. Harrah's Club and Sparks Nugget operate gambling casinos in the Reno-Lake Tahoe area, and provide other services for their customers, including entertainment.

The strike involved a dispute between the clubs and the house bands which play in certain of the principal entertainment rooms primarily for the purpose of accompanying acts appearing in those rooms.

On April 8, 1968, the American Guild of Variety Artists, AFL-CIO (hereafter AGVA), although not directly concerned in the labor dispute, sent telegrams to certain of its members advising them that AGVA approved the AFM strike and picket line and that according to the AGVA Constitution the member was not to perform in any of the Reno-Tahoe establishments where AFM was on strike.[1]

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[1] Gaylord and Holiday, Sid Caesar, and Tennessee Ernie Ford received telegrams from a national officer of AGVA that stated:

> "This is official notice that the AGVA National Board has voted to approve the AFM Strike and to honor the AFM picket lines in Reno and Tahoe. You are therefore advised that, according to AGVA Constitution, you are not to perform in any of the Reno-Tahoe establishments where AFM is on strike."

Dinah Shore and Tennessee Ernie Ford were also sent telegrams by the San Francisco Branch Manager of AGVA that are not argued to be materially different from the other telegrams. The message to Dinah Shore stated:

> "AGVA National advisors are not to perform at any Reno-Tahoe establish presently strick AFM or they are in violation of AGVA Constitution." (Errors in original).

Tennessee Ernie Ford's message stated:

> "AGVA National advises no acts are to perform at any Reno-Tahoe establishment presently struck by AFM or they are in violation of AGVA Constitution."

Sanctions could be levied against members who ignored the approved strike that ranged from fines to suspension from membership, censure, and, ultimately, expulsion.[2]

A charge was filed against AGVA on April 11, 1968, by Charles Peterson, the treasurer of the National Association of Orchestra Leaders, and a complaint was subsequently issued alleging that AGVA's conduct constituted an unfair labor practice in violation of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B).

Those sections of the Act provide in pertinent part:

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
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> * * *
>
> "(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> * * *

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[2] AGVA's Bylaws provided:

> "No member of AGVA shall cross an AGVA picket line, or any picket line supported or approved by AGVA. Any member found guilty of violating this Section shall be fined a minimum of $250.00 and/or be suspended for a minimum of thirty (30) days or both." C.T. 44.

The AGVA Constitution contained a general disciplinary article that states:

> "Section 1. Any member who shall violate or fail to observe any of the requirements of this Constitution or any of the By-laws, Rules, Regulations, Orders or Directives of the Association, or duly authorized committee or representative, or who shall fail to comply with a decision of any branch executive or other hearing committee or arbitration panel in connection with compliance with the provision of any minimum basic agreement, engagement contract, or rule or agreement respecting AGVA franchised agents, or any member who shall in any way be indebted to the Association may, after trial, be either fined, censured, suspended, expelled from membership or placed on the National Unfair List." C.T. 44.

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . ."

Following a hearing, the Trial Examiner concluded that the union members to whom the telegrams had been sent were "persons engaged in commerce" who had been "coerced" with the object of forcing them to "cease doing business with another person"—Harrah's Club or Sparks Nugget. Satisfied that the Act had been thus violated, the Trial Examiner issued a cease and desist order along with granting other affirmative relief. Exceptions were filed.

The Board reviewed the Trial Examiner's decision, reversed, and found that the respondent AGVA engaged solely in permissible primary activity with respect to the pressures it exerted on the entertainers to whom it had sent telegrams. Harrah's Club, as an intervenor, and Peterson, appeal from the Board's decision and order dismissing the complaint.

No. 25,007

This appeal arose from the same labor dispute as that involved in Nos. 24,553, and 24,607, except the conduct complained of was that of the striking union (Local 368) and its national (AFM), and not the supporting union, AGVA. Here, AFM struck several casinos that operated in the Reno-Lake Tahoe area, picketed those clubs, and placed the clubs on the union's national unfair list. Again, telegrams, as well as other notices and letters, were sent to AFM members, and to the employees of one member. Expulsion was the sole remedy which could be levied

against any AFM member who performed services for an organization placed on the unfair list.[3] Disciplinary proceedings were in fact instituted against two of the AFM member-employers, Judy Lynn and Ronnie Gaylord, and against the employees of one of the two employer-members. Proceedings were initiated against the first employer-member during the pendency of the strike, Ex.G.C. 22, but the second proceeding did not begin until approximately two months after the end of the strike. Ex.G.C. 24, 25. The end result of the proceedings does not appear in the record before this court.

The charge and complaint in this proceeding, No. 25,007, alleged violations of both 8(b)(4)(i) and (ii)(B). Those two sections differ primarily in that (i) is directed at conduct toward employees, while (ii) covers "any person engaged in commerce," and relates to secondary employers. The Trial Examiner in this case felt bound by the Board's decision in the AGVA matter because he concluded that there was no substantial difference between the activity of AGVA, and the activity of AFM, and he dismissed the complaint. The Board summarily affirmed the Trial Examiner. Harrah's Club appeals.

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[3] The AFM Bylaws provided only for expulsion:

> "Whenever any person, persons, organization or establishment is declared to be on the National Unfair or Defaulter List by the Federation, members cannot render services for or with such person, persons, organization, or for, or in, such establishment. If members render services for any person, persons, organization or establishment declared nationally unfair or in default by the Federation, such action shall constitute grounds for such members' expulsion from membership in the Federation and they can only be reinstated under such conditions as may be imposed upon them by the International Executive Board."

And the AFM threats clearly stated that only this bylaw was sought to be enforced by the charges that were filed. Ex.G.C. 19; G.C. 22; D; G.C. 24; G.C. 26.

This court has jurisdiction of the proceeding under Section 10(f) of the National Labor Relations Act, 29 U.S.C. 151 *et. seq.*

The Trial Examiner found that all of the entertainers to whom telegrams were sent were independent contractors and not employees of the particular club in which they were entertaining or had contracted to entertain.[4] Those entertainers were Gaylord & Holiday, Sid Caesar, Dinah Shore and Tennessee Ernie Ford in Nos. 24,553 and 24,607, and Judy Lynn and Gaylord & Holiday in No. 25,007. The Trial Examiner made no determination as to the status of George Liberace in the latter case. The Board did not disagree with the Examiner's judgment on this finding with respect to independent contractor status.

The controlling statute, Section 158(b)(4)(ii)(B), distills to the following pertinent language:

> "(b) It shall be an unfair labor practice for a labor organization . . . .
>
> * * *
>
> "(4)(ii) to threaten, coerce, or restrain any person . . . where . . . an object thereof is—
>
> * * *
>
> "(B) forcing or requiring any person . . . .to cease doing business with any other person . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike or primary picketing . . . ."

Before considering the proviso, let us examine for a moment the language of the statute preceding the proviso. It can hardly be argued that the telegrams were not threatening and coercive.[5] The Trial Examiners so found

[4] Had they been employees of the club which was the primary employer with whom the house bands had their labor dispute, then Section 8(b)(4) would not apply.

[5] See footnote 1.

in all cases. The Board in its opinion referred to the telegrams as "*requesting* that they honor the AFM picket line *or suffer union disciplinary action.*" (Emphasis added). Although the Board thereafter refers to the telegrams as containing "appeals" and "advice" we cannot believe that it would seriously disagree with the Examiner's conclusions. The unions did in fact commence disciplinary proceedings against Judy Lynn, each of the band members employed by her, and Ronnie Gaylord of Gaylord and Holiday for violation of union bylaws. R.T. 42.[6]

The telegrams sent to the performers referred to the vote by AGVA's National Board to "honor the AFM picket lines" and advised that:

> "[A]ccording to AGVA constitution, *you are not to perform* in any of the Reno-Tahoe establishments where AFM is on strike." (Emphasis supplied). *See* footnote 1, *supra*.

It was the finding of the Board and is the argument of appellee that this was a reference to primary activity and thus is within the protection of the proviso attached to Section 158(b)(4)(ii)(B), *supra*. We do not read it so.

If the interpretation of the Board is followed, then to all intents and purposes (ii)(B) of the Section is negated by the proviso so long as there is reference in the threatening communication to the primary activity which is taking place. The legislative history of the 1959 amendments adopted as a part of the Labor-Management Reporting and Disclosure Act of 1959 does not support this construction. The general purpose of the 1959 amendments was to close a number of loopholes in the existing law which were thought to permit various forms of secondary boycott and pressure on neutrals.

> "The basic justification for banning secondary boycotts is to protect genuinely neutral employers and

[6] Only Gaylord was a union member; Holiday was not.

their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer." S. Rep. No. 187, 86th Cong., 1st Sess. (1959), reported in 1959 *U.S. Code Cong. & Admin. News* at 2382.

With respect to neutrality and involvement or lack of it in the basic labor dispute between AFM on behalf of the house bands as employees and Harrah's Club as employer, let us examine the somewhat typical situation of Gaylord and Holiday who received telegrams and who are involved in all three appeals. The Trial Examiner described their operation as follows:

"Gaylord and Holiday constitute a comedy team with singing. With them in their act are two musicians, one a drummer and the other an organist or pianist. These two persons are selected and hired by Gaylord and Holiday and paid by them. The pianist, who is also their conductor, has a contract with Gaylord and Holiday at an annual salary, paid weekly. The drummer is paid when the act is performing. Harrah's Club makes no deductions from the weekly compensation paid to Gaylord and Holiday except the 10 percent that goes to their agent. Gaylord and Holiday, however, make social security and other deductions from the wages paid the drummer and the pianist, and I find that they are employees of Gaylord and Holiday. The pianist and drummer did not accompany Gaylord and Holiday during the period of the AFM strike.

"Harrah's Club determines when the act shall perform and how long it shall perform, but Gaylord and Holiday determine the contents of the act, except that they must comply with Harrah's policy on risque material.

"The main lounges where Gaylord and Holiday appeared are not Harrah's principal show rooms at

> Reno or Tahoe but are smaller rooms for entertainment seating approximately 250 persons each. Gaylord and Holiday do a self-contained act and did not utilize a house band or chorus line in their performances at Harrah's."
>
> Nos. 24,553 & 24,607, C.T. 39-40.

It thus appears that Gaylord and Holiday have no reason to be involved in the dispute which is pending between the club and the house band. They are neutrals and not combatants.[7] Their engagement at Lake Tahoe was scheduled for four weeks and evidenced by a written contract. Ex. G.C. 2.

One of the loopholes in the prohibition of secondary boycotts was a line of cases holding that Section 8(b)(4)(A) (predecessor section to the one here involved) did not apply to threats by a labor organization to an employer.[8]

In *Labor Board* v. *Servette, Inc.*, 377 U.S. 46 (1964), the Court considered the amendments of 1959 and particularly the significance of and reason for sub-sections (i) and (ii), pointing out that Congress intended the secondary boycott prohibition to reach secondary "employers" as well as employees. The Court said:

> "Moreover, the division of § 8(b)(4) into subsections (i) and (ii) by the 1959 amendments has direct relevance to the issue presented by this case. *It had been held that § 8(b)(4)(A) did not reach threats of*

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[7] We hasten to note that there are differences between the Gaylord and Holiday relationship with Harrah's and that relationship between Dinah Shore, Tennessee Ernie Ford, Judy Lynn and Sid Caesar. We do not find the differences of sufficient significance to alter the legal result.

[8] See *NLRB* v. *International Union of United Brewery Workers of America, AFL-CIO, Local 366*, 272 F.2d 817, 819 (10th Cir. 1959); *Rabouin* v. *NLRB*, 195 F.2d 906, 911-12 (2d Cir. 1952).

labor trouble made to the secondary employer himself. Congress decided that such conduct should be made unlawful, but only when it amounted to conduct which 'threaten[s], coerce[s] or restrain[s] any person', hence the addition of subsection (ii). The careful creation of separate standards differentiating the treatment of appeals to the employees of the secondary employer not to perform their employment services, from appeals for other ends which are attended by threats, coercion or restraint, argues conclusively against the interpretation of subsection (i) as reaching the Local's appeals to the supermarket managers in this case. If subsection (i), in addition to prohibiting inducement of employees to withhold employment services, also reaches an appeal that the managers exercise their delegated authority by making a business judgment to cease dealing with the primary employer, subsection (ii) would be almost superfluous. Harmony between (i) and (ii) is best achieved by construing subsection (i) to prohibit inducement of the managers to withhold their services from their employer, and subsection (ii) to condemn an attempt to induce the exercise of discretion only if the inducement would 'threaten, coerce, or restrain' that exercise." 377 U.S. at 53-54. (Footnotes omitted).

The footnote at the end of the above quotation also makes clear that threats directed to an employer are within the unfair labor practice provisions.

"The Conference Committee in adopting subsection (ii) understood that the subsection would reach only threats, restraints or coercion of the secondary employer and not a mere request to him for voluntary cooperation. Senator Dirksen, one of the conferees, stated that the new amendment 'makes it an unfair labor practice for a union to try to coerce or threaten an employer directly *(but not to persuade or ask him)*

> in order— . . . To get him to stop doing business with another firm or handling its goods." 105 Cong. Rec. 19849, II Leg. Hist. 1823. (Italics supplied.)" 377 U.S. at 54 n.12.

See also NLRB v. *Local 825, Operating Engineers, AFL-CIO,* Nos. 40 and 42, United States Supreme Court, January 12, 1971; *Labor Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760,* 377 U.S. 58, 68 (1946); *NLRB* v. *Construction & General Laborers' Union, Local 270,* 398 F.2d 86 (9th Cir. 1968); *NLRB* v. *District Council of Painters #48,* 340 F.2d 107 (9th Cir.), *cert. denied,* 381 U.S. 914 (1965).

We are therefore persuaded that since the telegrams were clearly intended to and did threaten, coerce and restrain an employer where "an object" thereof was to force or require that employer to cease doing business with Harrah's, the action did constitute an unfair labor practice, unless it was saved by the proviso of subsection (B), *supra.*

> "[T]hat nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . ."

However no action has been taken in the proceedings before the Board by Harrah's Club or AGVA, the primary respondent, as disclosed by the record here, to declare the primary strike or the primary picketing unlawful. Neither do the charges in any of the three cases before us attack the primary strike or the primary picketing. The complaint charges that on a certain date, respondent AGVA by telegram threatened Tennessee Ernie Ford with disciplinary action by respondent if he performed services for Harrah's Club. ¶ VIII, C.T. 9.

The next paragraph charges that an object of that action was to force or require Ford to cease doing business with Harrah's Club. C.T. 10. Finally, it is alleged that such

action constitutes an unfair labor practice within the meaning of Section 8(b)(4)(ii)(B) of the Act.[9] No charges were filed attacking the primary strike or the primary picketing.

The answer of respondent, AGVA, asserts that all of the "name" entertainers are employees of Harrah's, and therefore the coercion section does not apply. This issue has been found against them. In addition the answer asserts that the acts of AGVA as alleged in paragraph VIII of the complaint "were carried out in conjunction with a primary strike and primary picketing."[10]

The cases have pointed out the guidelines to be applied to activity in connection with a primary strike and primary picketing as being:

> "The primary strike, which is protected by the proviso, is aimed at applying economic pressure by halting the day-to-day operations of the struck employer. But Congress not only preserved the right to strike; it also saved 'primary picketing' from the secondary ban. Picketing has traditionally been a major weapon to implement the goals of a strike and has characteristically been aimed at all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt." *United Steelworkers of America, AFL-CIO* v. *Labor Board,* 376 U.S. 492, 499 (1964).

This court has held that under the circumstances of the case being decided, "we believe a union must exercise its right to picket with restraint consistent with the right of neutral employers to remain uninvolved in the dispute."

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[9] Similar charges were made with regard to each entertainer.

[10] *See Nat'l Woodwork Mfr's Ass'n.* v. *NLRB,* 386 U.S. 612, 632 n.20 (1967).

Retail Fruit & Vegetable Clerks Union, Local 1017 v. *NLRB*, 249 F.2d 591, 599 (9th Cir. 1957). This is in accord with the view of the Supreme Court even before the 1959 amendments, in saying with respect to the litigants in *Labor Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951):

> "[A]s applied to this case we find conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."

The Board takes the view that the conduct of the respondent "in *advising* its members to honor the AFM picket lines was not substantially different from that of the AFM itself in conducting the picketing at the situs of the disputes, namely at the clubs themselves." How much difference in practical effect between the sending of the telegrams and the doing of substantially the same thing at the picket lines is, of course, debatable. The answer is that Congress in 1959 by law made it an unfair labor practice to threaten, coerce or restrain a secondary employer. The entertainers here were secondary employers and they were threatened, coerced and restrained. Whether the respondent could have done the same thing or not at the picket line itself in reliance upon the proviso is beyond the issues of this case. We cannot agree with the Board in its disregard of the plain language of the statute.

Nor does the threat of union disciplinary action rather than the threat of a picket line around the homes or offices of the entertainers, make respondent's actions any less a violation of statute. *Glaziers Local 1184, (Tennessee Glass Co.,)* 164 N.L.R.B. 116 (1967). In *Tennessee Glass Company,* the secondary employers were also members of the union which was engaged in the primary labor dispute. They were independent contractors operating proprietor-

ships and a partnership engaged in the installation of glass. They purchased their supplies from Tennessee, the primary employer, which had the dispute with Local 1184. They were sent copies of letters which called attention to the dispute and to the strike and continued:

> "[W]e are instructing our members who are in any way, form or fashion doing business with Tennessee Glass Co. or any of their Associates to stop immediately. We are saying that . . . Local Union No. 1184 will bring charges against any member found guilty of having any connection with this situation with Tennessee Glass Co. or their Associates." 164 N.L.R.B. at 117.

The Board agreed with the Trial Examiner's finding of an unfair labor practice and a violation of Section 8(b)(4)(ii)(B) of the Act. There was no contention in that case as there is here that the violation was negated by the proviso. The union urged as a defense, among others, that the contractors were not coerced by the letter. Said the Examiner:

> "The issue is not the fact of coercion but whether the letter reasonably tended to coerce the contractors. A reading of the letter demonstrates conclusively that it was intended to coerce the independent contractors into a cessation of business with Tennessee by threatening the contractors herein with disciplinary action." 164 N.L.R.B. at 118.

See also Laundry, Dry Cleaning, Industrial, Linen Supply and Dust Control Drivers Local 209, (East Bay Counties Dry Cleaners Association), 167 N.L.R.B. 45 (1967).[11]

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[11] The possible conflict between Section 8(b)(1)(A) and the proviso appended thereto (stating that nothing in that paragraph shall impair the right of a labor organization to prescribe its own rules with respect to acquisition and retention of membership) and Section 8(b)(4)(ii)(B) in the light of the facts of this case where the secondary employers were also union members, has not been

The Board appears to rely heavily upon the *General Electric* and *Carrier* decisions.[12]

In each of those cases the problem concerned picketing at the premises of the employer with whom the primary labor dispute existed. The question was whether a separate gate at the premises could be so reserved and so marked for the use of employees of secondary employers that it could be free from the primary picketing. In neither case was a telegram or letter sent to the secondary employer which involved threats, coercion and restraint directed to a disruption of his contract or his business relationship with the primary employer. We do not find those cases controlling in this fact situation.

Likewise, in our view of the case it is not necessary to examine the highly debatable question whether the entertainment of the star performers was "inextricably involved with and necessary to the normal operations of the casinos," as found by the Board. The problem of sorting out the normal operations of a business and making a determination of whether employees of secondary employers are a necessary part of those normal operations, becomes vital in cases like *Carrier* and *General Electric* where there is a separate gate controversy. There is none here. The

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raised either by the pleadings, or by the Board. It was discussed only by intervenor AGVA and was mentioned in passing by the Trial Examiner. We do not consider it an issue here since 8(b)(1)(A) refers to employees while our concern is with secondary employers.

It is interesting to note that in *East Bay Counties Dry Cleaners Association*, 167 N.L.R.B. 45, 51 (1967), the respondent union made the same contention that is made here, i.e. that the conduct in which the union engaged does not fall within the purview of Section 8(b)(4) because it was primary in nature.

[12] *International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 761* v. *Labor Board (General Electric Co.)*, 366 U.S. 667 (1961); *United Steelworkers of America, AFL-CIO* v. *Labor Board (Carrier Corp.)*, 376 U.S. 492 (1964).

complaint here is addressed to the lawfulness of coercion of employers directly by sending threatening telegrams to them. No question is raised about the mechanics of the primary picketing.

The final question raised is that of the application of the "ally" doctrine. That doctrine is to the effect that if the struck primary employer farms out to a business ally which the strikers would ordinarily perform, the employer to whom the work has been farmed out cannot be considered a secondary employer but stands in the same position as the primary employer as respects application by the union of economic pressures. *NLRB* v. *Business Machine & Office Appliance Mechanics Conference Board, Local 459, (Royal Typewriter Co.)*, 228 F.2d 553 (2d Cir. 1955). The Trial Examiner found that both Tennessee Ernie Ford and Dinah Shore were in the position of allies and thus there was no unfair labor practice as to them. The Board did not reach the question. We have some difficulty in following the rationale of the Trial Examiner to the effect that Ford was an ally and that Miss Shore would have been an ally had she performed. We defer, however, to the expertise which we hope the Trial Examiner has in such a matter.

Both the Trial Examiner and the Board are in substantial agreement as to the material facts. We have reviewed the whole record including the report of the Examiner and the decision of the Board. We find that there is substantial evidence, indeed overwhelming evidence, to support the findings of fact to the effect that the entertainers to whom telegrams were sent were independent contractors; that the telegrams sent by respondent threatened, coerced and restrained the independent contractors who received them; and that they were sent for the unlawful object of forcing or requiring the recipients to cease doing business with Harrah's Club or Sparks Nugget. It appears clear that the Board in basing its decision upon the legal conclusion that respondent was engaged in permissible primary

activity is in error. All three cases present substantially the same fact situations and the same legal problems. In all three there was a finding by the Trial Examiner that the name entertainers were independent contractors and not employees and thus were "employers"; in all, he found that there had been threats and coercion an object of which was to cause the secondary respondents to cease doing business with the primary employer. The Board ruled as a matter of law that this was "primary activity." There being no substantial evidence to support that decision when viewed in the light of the record in its entirety, we grant the petition for review, decline to enforce the orders and vacate the decision of the Board in each of the three cases. In each case we find that the actions of the particular union complained about constituted unfair labor practices in violation of Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. § 158(b)(4)(ii)(B). All three cases are remanded to the Board for the purpose of enabling it to enter an order in each in accordance with the tenor of this decision.

[April 26, 1971]

Order on Rehearing

Before: HAMLEY, JERTBERG and TRASK, Circuit Judges.

On consideration the petition for rehearing, it is the order of the court that the next to last sentence of the opinion be amended to read as follows:

> In each case we find that the actions of the particular union complained about constituted unfair labor practices in violation of Section 8(b)(4)(ii)(B) of the Act, 29 U.S.C. § 158(b)(4)(ii)(B), and in No. 25,007 a violation of 8(b)(4)(i)(B) of the Act, 29 U.S.C. § 158(b)(4)(i)(B) insofar as the unlawful activities applied to employees of one of the secondary employers.

Except as herein modified the petition for rehearing is denied.

APPENDIX B

176 NLRB No. 77 D-2076
Reno, Nev.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 20-CC-782

AMERICAN GUILD OF VARIETY ARTISTS, AFL-CIO
(HARRAH'S CLUB, ET AL.)
and
CHARLES PETERSON, An Individual

Decision and Order

On February 11, 1969, Trial Examiner James R. Webster issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other alleged unfair labor practices and recommended dismissal of those allegations of the complaint. Thereafter, the General Counsel, the Respondent, and the Intervenor, Harrah's Club, filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recom-

mendations of the Trial Examiner only to the extent consistent herewith.

Harrah's Club and Sparks Nugget operate gambling casinos in the Reno-Lake Tahoe area, and provide other services including entertainment for their customers. In their main showrooms, the clubs employ on a year-round basis what are known as house bands, the primary function of which is to accompany top-name entertainers appearing in the showrooms. From March 1 through April 30, 1968, these house bands, represented by the American Federation of Musicians, went on strike against Harrah's, the Sparks Nugget and other clubs in the area. In sympathetic support of the AFM strike, Respondent AGVA sent telegrams to its members Gaylord and Holiday, Dinah Shore, and Tennessee Ernie Ford (scheduled to perform at Harrah's) and Sid Caesar (scheduled to perform at the Nugget) requesting that they honor the AFM picket lines or suffer union disciplinary action.

The Trial Examiner found that Respondent's telegrams to Gaylord and Holiday and to Sid Caesar coerced and restrained them not to work at the casinos in violation of Section 8(b)(4)(ii)(B) of the Act. He dismissed similar allegations against Respondent with respect to the telegrams it sent to Dinah Shore and Tennessee Ernie Ford on the ground that these entertainers had, or would have, performed struck work for Harrah's Club and, therefore, were allies of that primary employer. We find that Respondent engaged solely in permissible primary activity with respect to the pressures it exerted on all of these entertainers.[1]

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[1] In view of our disposition of the issues raised by the allegations of the complaint, *infra*, we deem it unnecessary to decide whether any of the star entertainers involved herein, or all of them, performed or agreed to perform "struck work" within the meaning of *N.L.R.B. v. Business Machines and Office Appliance Mechanics Conference Board, etc. (Royal Typewriters)*, 228 F.2d 553, or whether they are employees within the meaning of Section 2(3) of the Act, as contended by Respondent.

It was not the intent of Congress, nor has the Board construed the language of Section 8(b)(4), to proscribe primary action by striking employees who are engaged in a legitimate labor dispute with their employer.[2] For example, little would be left of the right to strike if striking employees were denied the concomitant right of peacefully picketing the immediate business of their employer. Yet, plainly, the object of picketing is frequently to influence third persons to withhold their business or services from the struck employer during the course of the dispute. In terms of effect, then, there may well be no distinction between lawful primary picketing and unlawful secondary picketing proscribed by Section 8(b)(4). One important test of the lawfulness of a union's picketing activities in the course of its dispute with an employer is the identification of such picketing with the actual functioning of the primary employer's business at the situs of the labor dispute.[3] Thus, as the Supreme Court has recently stated in affirming those Board Decisions which had adopted this general principle, direct appeals to "all those approaching the situs whose mission is selling, delivering or otherwise contributing to the operations which the strike is endeavoring to halt" to withhold their services constitutes traditional primary activity outside the scope of Section 8(b)(4).[4]

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[2] See *Local 761, IUE* v. *N.L.R.B. (General Electric Company)*, 366 U.S. 667 and cases cited therein.

[3] *International Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Services, Inc.)*, 87 NLRB 502, 505.

[4] *United Steelworkers* v. *N.L.R.B. (Carrier Corporation)*, 376 U.S. 492, 499. See also, *Oil Workers, Local 346 (The Pure Oil Company)*, 84 NLRB 315, 319; *International Brotherhood of Teamsters, Local 807 (Schultz Refrigerated Services, Inc.)*, 87 NLRB 502, 505; *Newspaper and Mail Deliverers Union (Interborough News Company)*, 90 NLRB 2135, 2149-2150; *Sailors Union of the Pacific (Moore Drydock)*, 92 NLRB 542, 551-552.

In applying these traditional principles to the present case, it is not and cannot be contended that Respondent's actions called for anything but the refusal of the entertainers to cross the picket lines of the striking musicians at the clubs in question. The picket lines were established in furtherance of a primary strike of the employees of the picketed casinos, and the telegrams advised the stars that AGVA supported the strike and instructed them to honor the picket line. The conduct of the Respondent in advising its members to honor the AFM picket lines was not substantially different from that of the AFM itself in conducting the picketing at the situs of the disputes, namely at the clubs themselves. Accordingly, we find that AGVA's conduct does not fall into the category of illegal secondary activity by virtue of the fact that it assisted another union in that union's labor dispute.[5]

It is clear, moreover, that the work of the AGVA stars here involved not only contributed "to the operations which the strike . . . [was] endeavoring to halt" but in fact was directly related to the normal operations of these casinos. The record demonstrates that the shows in which the stars were engaged to perform are an important means of enticing the public to the clubs in the hope and reasonable expectation that once inside the club they can be induced to try their luck in the casinos. Moreover, the actual performances of the star-type entertainer are coordinated into the overall show offered by the club by club managers as to timing, pace, material, rehearsals, etc., all with a view to enhancing the financial success of the gambling enterprise. The presence of such entertainers, then, is a customary and necessary adjunct to the Nevada casino operations. Accordingly, inasmuch as the work of the star performers was

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[5] *Milwaukee Plywood Company*, 126 NLRB 650. Nor does the General Counsel contend that the activity in question was unlawful because AGVA was not directly involved in a labor dispute with the casinos.

in fact inextricably involved with and necessary to the normal operations of the casinos, and as Respondent's telegramed instructions to all of the performers involved to honor the AFM picket line appealed for and induced action only at the situs of the dispute by persons "contributing to the operations which the strike was endeavoring to halt," we find that they constituted permissible primary activity.[6] We shall, therefore, dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. June 11, 1969.

JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
SAM ZAGORIA, *Member*

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[6] We reject the apparent view of the Trial Examiner and theory of the General Counsel that, because the star entertainers are independent contractors, rather than employees, appeals to them to honor a picket line lose their character as permissible primary activity when accompanied by threats of internal disciplinary action by the union of which they are members. In our view, the decision in *Tennessee Glass Company, Inc.*, 164 NLRB No. 19, rests on the fact that the independent contractors involved therein were asked, not simply to observe a picket line but to stop doing business completely with the struck employer, under pain of union disciplinary action. Though we continue to adhere to the view that union disciplinary action directed against employer-members and independent contractor-members of the union may, in some circumstances, constitute, restraint, or coreeion within the meaning of Section 8(b)(4)(ii), imposition of such sanctions does not convert appeals for permissible action into appeals for an unlawful object.

APPENDIX C

TXD-(SF)-16-69
Reno, Nev.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 20-CC-782

AMERICAN GUILD OF VARIETY ARTISTS, AFL-CIO
(HARRAH'S CLUB, ET AL.)

and

CHARLES PETERSON, An Individual

Kenneth Silbert, Esq., of San Francisco, Calif., for the General Counsel.

Howard Schulman and *Stephen Weiss, Esqs.*, of *Schulman, Abarbanel & Kroner*, of New York City, N.Y., for the Respondent.

Nathan R. Berke, Esq., of *Severson, Worsen, Berke and Bull*, of San Francisco, Calif., for Harrah's Club, an Intervenor.

Ronald Rosenberg, Esq., of *Van Arkel and Kaiser* of Washington, D. C., for Local 368, AFM, an Intervenor.

Trial Examiner's Decision

STATEMENT OF THE CASE

JAMES R. WEBSTER, Trial Examiner: This case with all parties represented was heard in Reno, Nevada, on November 18, 19, and 20, 1968, on complaint of the General Counsel and answer of American Guild of Variety Artists, AFL-

CIO, herein called Respondent or AGVA. The complaint was issued on August 22, 1968, on a charge filed April 11, 1968. The complaint alleges that Respondent threatened, coerced or restrained certain performing artists for the object of forcing or requiring them to cease doing business with Harrah's Club and Sparks Nugget, Inc., in support of a labor dispute that the American Federation of Musicians, AFL-CIO, herein called AFM, had with Harrah's Club and Sparks Nugget, and other similar establishments in the area, thereby engaging in violations of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, herein called the Act.

The General Counsel, Respondent and Harrah's Club have filed briefs herein and they have been carefully considered.[1] Upon the entire record and my observation of the witnesses, I hereby make the following:

Findings of Fact

I. The Businesses of the Primary Employers

Harrah's Club is a Nevada corporation with places of business in Reno and Lake Tahoe, Nevada, where it is engaged in the operation of restaurants and gambling casinos. During the past year in the course and conduct of its business operations, it received gross revenue in excess of $500,000 and purchased and received goods valued in excess of $50,000 directly from points outside the State of Nevada.

Sparks Nugget, Inc., is a Nevada corporation with a place of business in Sparks, Nevada, where it is engaged in the operation of a gambling casino, restaurants, and a hotel. During the past year, Sparks Nugget received in the course and conduct of its business operations gross revenue in

[1] On January 13, 1969, Attorney for Intervenor, Harrah's Club, filed motion to correct official transcript. No opposition thereto has been filed and the motion has been carefully considered. The motion is granted.

excess of $500,000. During the same period it purchased and received goods valued in excess of $50,000 directly from points outside the State of Nevada.

I find that Harrah's Club and Sparks Nugget, Inc., are employers engaged in commerce and in an industry affecting commerce within the meaning of Section 2(6) and (7) and Section 8(b)(4) of the Act.

II. The Labor Organizations Involved

American Guild of Variety Artists, AFL-CIO, Respondent herein, American Federation of Musicians, AFL-CIO, herein called AFM, and Reno Musicians Protective Association No. 368, AFL-CIO, herein called Local 368, AFM, are labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *Issues and Prefatory Statement*

The issues are as follows: (1) Whether the artists involved herein, Gaylord and Holiday, Sid Caesar, Dinah Shore, and Tennessee Ernie Ford, are employees or independent contractors in their relations with Harrah's Club and Sparks Nugget. (2) If all or any of them are independent contractors, are they allies of either of these clubs in connection with their performances at these clubs during the strike of the American Federation of Musicians? (3) And, if they are independent contractors, did Respondent threaten, coerce or restrain them not to work for Harrah's Club or Sparks Nugget by language contained in telegrams dispatched by Respondent to each of these entertainers?

The American Federation of Musicians and Reno Musicians Protective Association No. 368 had a labor dispute and a strike at Harrah's Club and Sparks Nugget and other

hotels in Reno, Nevada, for the period of March 1 to April 30, 1968.

On April 3, 1968, Respondent sent each of the above-named entertainers telegrams regarding their appearances at Harrah's Club or Sparks Nugget during the period of the strike. Telegrams were sent by Penny Singleton, Second Vice President of Respondent, to Gaylord and Holiday, Sid Caesar and Tennessee Ernie Ford as follows:

> This is official notice that the AGVA National Board has voted to approve the AFM strike and to honor the AFM picket lines in Reno and Tahoe. You are therefore advised that, according to AGVA Constitution, you are not to perform in any of the Reno-Tahoe establishments where AFM is on strike.

Telegrams were sent by Truman McDaniel, the San Francisco Branch Manager of Respondent, to Dinah Shore and Tennessee Ernie Ford as follows:

> To Dinah Shore:
>
> AGVA National advisors are not to perform at any Reno-Tahoe establish presently struck AFM or they are in violation of AGVA Constitution. [as received]
>
> To Tennessee Ernie Ford:
>
> AGVA National advises no acts are to perform at any Reno-Tahoe establishment presently struck by AFM or they are in violation of AGVA Constitution.

B. *Gaylord and Holiday*

At the time of the telegram to Gaylord and Holiday, they were performing at the Main Lounge of Harrah's Club at Lake Tahoe, Nevada. They had just completed a 4-week engagement at the Main Lounge of Harrah's Club in Reno, Nevada, which engagement was from March 1 through March 28, 1968. The engagement at Lake Tahoe

was scheduled for 4 weeks, from April 1 through April 28, 1968. Gaylord and Holiday completed this engagement.

The contract for the performance of Gaylord and Holiday at Harrah's Club was executed in August 1966 and covered their performances for a total of 30 weeks to be performed in 1967 and 1968. By the terms of the contract, Harrah's Club is designated "employer" and Gaylord and Holiday are designated as "employees." The contract is on a standard form of the American Federation of Musicians. All of their performances in 1967 and 1968 were scheduled for the Main Lounges of Harrah's Club at Reno, Nevada, and Lake Tahoe, Nevada. The contract specified the days and hours of work and the weekly compensation that they were to receive. They were to perform 6 days weekly, not to exceed a maximum of 4 shows nightly to be played during a consecutive 6-hour period. They were scheduled to receive the sum of $8,500 per week for performances at Reno and $12,500 per week for performances at Lake Tahoe, with 10 percent of their gross weekly compensation to be deducted by Harrah's Club and forwarded to their agent in Los Angeles, California. To comply with Harrah's policy of no risque material, Gaylord and Holiday agreed to review their material and to delete anything they felt might be objectionable, and to submit any portion of their act that they thought might be questionable or borderline to the entertainment director of Harrah's for approval.

Gaylord and Holiday constitute a comedy team with singing. With them in their act are two musicians, one a drummer and the other an organist or pianist. These two persons are selected and hired by Gaylord and Holiday and paid by them. The pianist, who is also their conductor, has a contract with Gaylord and Holiday at an annual salary, paid weekly. The drummer is paid when the act is performing. Harrah's Club makes no deductions from the weekly compensation paid to Gaylord and

Holiday except the 10 percent that goes to their agent. Gaylord and Holiday, however, make social security and other deductions from the wages paid the drummer and the pianist, and I find that they are employees of Gaylord and Holiday. The pianist and drummer did not accompany Gaylord and Holiday during the period of the AFM strike.

Harrah's Club determines when the act shall perform and how long it shall perform, but Gaylord and Holiday determine the contents of the act except that they must comply with Harrah's policy on risque material.

The main lounges where Gaylord and Holiday appeared are not Harrah's principal show rooms at Reno or Tahoe but are smaller rooms for entertainment seating approximately 250 persons each. Gaylord and Holiday do a self-contained act and did not utilize a house band or chorus line in their performances at Harrah's. By their contract with Harrah's, they received 100 percent sole star billing in the Main Lounges, and if any other act appeared in these lounges with them, it was a relief act.

C. Sid Caesar

By contract dated April 2, 1968, on an AGVA standard form contract, Sparks Nugget engaged Sid Caesar to entertain at its main show room, the Circus Room, in Sparks, Nevada, for the period of April 5 to 11, 1968, for the sum of $20,000. This contract was hastily negotiated for the reason that the act that had been scheduled for this period would not or could not perform because of the AFM strike.

Sid Caesar and his supporting actor, Mickey Deems, drove to Sparks, Nevada, on April 3, 1968. After their arrival, Caesar received the AGVA telegram. He decided not to perform.

Caesar performs various kinds of acts. One of his acts consists of comedy monologues in association with Mickey

Deems. Caesar determines the contents of his act, and a club, such as Sparks Nugget, however, can ask him to delete any portion it considers risque.

Generally, a show in a room such as the Circus Room consists of a production number with chorus girls, one or two supporting acts, and a star. A singing star usually brings his own music, his conductor and a pianist. A band is furnished by the club. A show normally runs about 75 minutes. It is standard practice for the chorus line to perform for approximately 5 minutes. It is Caesar's practice to fill the remaining 70 minutes with himself and his people.

Caesar selects and compensates his supporting actors. The Nugget makes no deductions from the compensation paid Caesar except for the AGVA trust funds as specified in the contract. The Nugget determines the time for the performances, the length of the performances and the rehearsal times.

D. *Dinah Shore*

On March 19, 1968, a contract on an AGVA standard form was negotiated between Harrah's Club and Dinah Shore, a singing star, for her performance for 3 consecutive weeks, 7 days weekly, commencing on April 4, 1968. Renumeration was in excess of $50,000. She was to provide and pay for two supporting acts, and Harrah agreed to provide and pay for an orchestra consisting of 21 musicians with instrumentation as designated by Shore. It was anticipated by Shore and her agents that the musicians' strike would be over prior to the commencement of her performance. Through her agents she contracted with comedian Pat Henry to appear with her as a supporting act, and she contracted with the Little Steps, a dancing group of four persons, also to appear with her on this show. Harrah's Club was informed of their identity and the amounts of their contracts. Har-

rah's was interested in the caliber of the supporting acts, but did not take any part in the selection of these acts nor in the amount of compensation they were to receive. Shore is normally accompanied by her personal manager, a hairdresser, and two musicians—a pianist-conductor and a drummer. These are paid by her and she deducts necessary employee withholdings from their wages.

As the date for the engagement approached, a meeting was held by those representing Dinah Shore in an effort to work out a means by which she could appear without the musicians, who were on strike. The thought of using a choral group of 20 voices was considered, but on April 1 or 2, 1968, it was decided that she would not appear as no musicians could be furnished by Harrah's Club and as she was unable to work out any means by which she could perform without musicians. On April 3, 1968, she received the telegram from AGVA.

E. *Tennessee Ernie Ford*

On December 12, 1967, on an AGVA standard form contract, Harrah's Club negotiated for the services of Tennessee Ernie Ford for an engagement at the Headliner Room, Harrah's Club in Reno, Nevada, for a period of 2 weeks of 15 shows weekly, commencing on March 28, 1968, with remuneration in excess of $50,000. Ford entertains by singing and telling stories. He agreed to provide and pay for one supporting act and Harrah agreed to provide and pay for a 17-piece band instrumented as advised by Ford. By agreement dated January 23, 1968, the engagement was changed from a 2-week engagement to a 3-week engagement, commencing on March 21, 1968. Ford commenced the performance on the scheduled opening date and performed for the first week and 5 days of the second week. He then discontinued his engagement upon receipt of the AGVA telegram.

Ford's contracts and many other business matters are handled for him by Bedford Corporation, a corporation

set up for this purpose. Prior to the Harrah's Club engagement, Bedford Corporation contracted with the Good Time Singers as a supporting act for this engagement, but they did not appear. Accompanying Ford on this engagement, as well as on other engagements, were his personal manager, his conductor, and a man who functions as road manager. These persons receive their wages from Ford or Bedford Corporation.

As with all other performers, Harrah's Club determines the time of the performance and the length of the performance. Ford determines the songs and monologues. The proposed schedule for the contents of the show provided for a production number lasting 4 minutes, songs and monologues by Ford for 24 minutes, Bobbi Martin for 10 minutes, Good Time Singers for 18 minutes, Ford with the Good Time Singers for 4 minutes, and Ford's songs and monologues for 25 minutes. The total show was scheduled for 85 minutes. Bobbi Martin was booked directly by Harrah's Club. The proposed performance was not used as the Good Time Singers did not appear; the Club was unable to furnish musicians, and Ford, therefore, did not sing and told stories only.

F. *Conclusions*

I find that each of the artists involved herein, Gaylord and Holiday, Sid Caesar, Dinah Shore and Tennessee Ernie Ford are independent contractors and not employees in their relationships with Harrah's Club and Sparks Nugget. This is based principally on a lack of the right of the clubs to control the contents of their acts except as to risque material, the specialized and individualistic nature of the performances of the artists, the fact that their relationships with the clubs are limited and not continuous, and the fact that the artists are responsible for all expenses incident to the assemblying and presentation of their acts and they bear the risks of profit or loss in completing an engagement within the contract compensation. The fact that the AGVA form contract

refers to the club operators as employers and the artists as employees is not controlling. Thus, I find that the artists involved herein are secondary employers or persons to the dispute between AFM and the clubs. I find that they are persons or employers engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) and 8(b)(4) of the Act.[2]

A union may make an appeal to secondary employers to cease engaging in business with a primary employer with whom the union has a dispute,[3] but a union is precluded by Section 8(b)(4)(ii)(B) from accompanying such appeals with threat, restraint or coercion.[4]

However, by the "ally doctrine" a secondary employer may be juxtaposed into a position with a primary employer, as to the matters involved in a labor dispute, so that his operations stand in place of those of the primary employer. Then, Section 8(b)(4)(ii)(B), applicable to secondary employers, would not be applicable to him; and a union may engage in the same conduct toward him as it may engage in against the primary employer.

As to whether or not the artists involved herein are allies of Harrah's Club and Sparks Nugget, the primary employers, depends on whether or not the artists performed or supplanted struck work—the work of the striking musicians, or were called upon to perform or supplant such work.[5] If, in order to fill in the void created

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[2] *The Light Company, Inc.*, 121 NLRB 221; *National Symphony Orchestra Assn.*, 157 NLRB 735.

[3] *International Rice Milling Co.*, 341 U.S. 665, with the exception created by the reserved gate doctrine which precludes a union from doing even this in certain situations. *General Electric Co.*, 366 U.S. 667.

[4] *East Bay Counties Dry Cleaners Assn.*, 167 NLRB No. 6; *Tennessee Glass Company, Inc.*, 164 NLRB No. 19.

[5] *Royal Typewriter Co.*, C.A. 2, 37 LRRM 2219; *General Metals Corp.*, 42 LRRM 1145, 120 NLRB 1227; *Climax Machinery Co.*, 25 LRRM 1052, 86 NLRB 1243.

by the absence of the musicians, an artist entertains for a period longer than he would have done if the musicians were present, then he in effect would be doing struck work, even though the artist's entertainment during this additional time is not or would not be identical to that of the musicians. Regardless of its nature, it would be entertainment replacing struck entertainment. On the other hand, if an artist did no more entertaining than he would have done in the absence of the strike, then he would not be an ally.

Gaylord and Holiday perform a self-contained act and the musicians of Harrah's were not scheduled to work with them. Gaylord and Holiday did not perform in Harrah's main show room. They supplanted no struck work and thus were not allies of Harrah's Club in its dispute with AFM.

Tennessee Ernie Ford was in the midst of his engagement when he received AGVA's telegram. As there was no musical accompaniment for his songs, he abandoned his original schedule for the show and entertained with stories only. In filling in and completing the show in this manner, he was in part supplanting the work of the band. In so doing, he became an ally of Harrah's Club in its dispute with AFM.

Sid Caesar and Dinah Shore did not perform, Dinah Shore was unable to perform without the band and because of its absence she decided not to appear prior to the receipt of the AGVA telegram. Had she performed with choral accompaniment or had she substituted some other type of entertaining for her singing with the band, she would have been an ally of Harrah's Club.

Sid Caesar is primarily a comedian and not a singer and he could have completed his part of the show without musicians. He normally performs 70 minutes of a show without utilization of a band. However, on receipt of the AGVA telegram, he decided not to appear. As he normally performs 70 minutes of his show with himself and

his people and without the house band, I find that he was not scheduled to perform struck work and was not an ally of Sparks Nugget.

Respondent's telegrams to the artist, however, did not differentiate between struck work and other work. Each was ordered "not to perform" in any of the Reno-Tahoe establishments being struck. McDaniel's telegrams warned that acts that performed would be in violation of AGVA constitution. Singleton's telegrams advised that "according to AGVA Constitution," the acts were not to perform.

Section I, Article XVII of Respondent's constitution provides as follows:

> Any member who shall violate or fail to observe any of the requirements of this Constitution or any of the By-Laws, Rules, Regulations, Orders or Directives of the Association, or duly authorized committee or representative, or who shall fail to comply with a decision of any branch executive or other hearing committee or arbitration panel in connection with compliance with the provisions of any minimum basic agreement, engagement contract, or rule or agreement respecting AGVA franchised agents, or any member who shall in any way be indebted to the Association may, after trial, be either fined, censured, suspended, expelled from membership or placed on the National Unfair list.

Respondent's rule 14 provides as follows:

> No Member of AGVA shall cross an AGVA picket line, or any picket line supported or approved by AGVA. Any member found guilty of violating this Section shall be fined a minimum of $250 and/or be suspended for a minimum of thirty (30) days or both.

Thus, the artists were threatend with fines, censure, suspension and expulsion if they violated the directive. This is clearly coercion within the meaning of Section

8(b)(4)(ii), and where done for an objective proscribed by subsections in Section 8(b)(4), it constitutes an unfair labor practice. It is not made otherwise by the proviso to Section 8(b)(1)(A) which places a limitation on conduct defined as an unfair labor practice by that Section.

Subsection (B) to Section 8(b)(4) proscribes coercion of any person where an object thereof is to force any person to cease doing business with any other person. I find that Respondent, by its telegrams to Gaylord and Holiday and to Sid Caesar, violated Subsection 8(b)(4)(ii)(B) of the Act.

As Ford was performing struck work, and as Shore would have performed struck work if she had performed, and therefore being allies of Harrah's Club, the coercion contained in Respondent's telegrams to them is not proscribed by a subsection to Section 8(b)(4) of the Act, and therefore did not violate the Act. Under the circumstances of the nature of the performances of these two stars, I find that the fact that the telegrams were broadly worded and not restricted to struck work is not significant.

Upon the foregoing findings of fact and conclusions and upon the entire record, I make the following:

Conclusions of Law

1. Harrah's Club and Sparks Nugget, Inc., are employers engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6) and (7) and 8(b)(4) of the Act.

2. Dinah Shore, Tennessee Ernie Ford, Gaylord and Holiday, and Sid Caesar are persons and/or employers engaged in commerce and in operations affecting commerce within the meaning of Section 2(1), (2), (6) and (7) and 8(b)(4) of the Act.

3. By threatening, restraining and coercing Gaylord and Holiday and Sid Caesar with fines, censure, suspension or explusion for an object of forcing or requiring them to

cease doing business with Harrah's Club and Sparks Nugget, respectively, Respondent has engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(B) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not engaged in unfair labor practices by its telegrams to Tennessee Ernie Ford and Dinah Shore.

The Remedy

Having found that Respondent has engaged in unfair labor practices violative of Section 8(b)(4)(ii)(B) of the Act, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

On the basis of the foregoing findings of fact and conclusions of law and the entire record herein, I recommend that, pursuant to Section 10(c) of the Act, the Board issue the following:

ORDER

American Guild of Variety Artists, AFL-CIO, its officers, agents, representatives, successors and assigns, shall:

1. Cease and desist from threatening, coercing, or restraining Gaylord and Holiday, Sid Caesar, or any other person engaged in commerce or in an industry affecting commerce, for an object of forcing or requiring said person to cease doing business with Harrah's Club or Sparks Nugget.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its headquarters and in each of its offices, including all places where notices to members are customarily posted, copies of the notice attached hereto

marked "Appendix."[6] Copies of said notice, to be furnished by the Regional Director for Region 20 of the National Labor Relations Board, after being duly signed by an authorized representative of Respondent, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent therein to insure that said notices are not altered, defaced or covered by any other material.

(b) Sign and mail sufficient copies of said notice to the Regional Director, Region 20, for the information of Harrah's Club, Sparks Nugget, Sid Caesar and Gaylord and Holiday and for posting by said employers or persons, if willing, at locations on their premises where notices to employees are posted.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of receipt of a copy of this decision, what steps Respondent has taken to comply herewith.[7]

It is recommended that the complaint be dismissed insofar as it alleges unfair labor practices by Respondent by telegrams to Dinah Shore and Tennessee Ernie Ford.

Dated:

JAMES R. WEBSTER
James R. Webster
Trial Examiner

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[6] In the event that this Recommended Order is adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[7] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 20, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

APPENDIX

NOTICE

To All Members of American Guild of Variety Artists, AFL-CIO

Pursuant To
The Recommended Order of a Trial Examiner of the
National Labor Relations Board
and in order to effectuate the policies of the
National Labor Relations Act

(as amended)

we hereby notify you that:

WE WILL NOT threaten, coerce or restrain Gaylord and Holiday, Sid Caesar, or any other person engaged in interstate commerce, with fines, censure, suspension or expulsion for an object of forcing or requiring said person to cease doing business with Harrah's ~~Club~~ and/or Sparks Nugget.

American Guild of Variety Artists,
AFL-CIO
(Labor Organization)

Dated.....

By.....
(Representative)
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If members have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 13050 Federal Building, 450 Golden Gate Ave., Box 36047, San Francisco, Calif., Tel. No. 556-0335.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 20-CC-771
20-CC-773

AMERICAN FEDERATION OF MUSICIANS, AFL-CIO; and RENO MUSICIANS PROTECTIVE ASSOCIATION #368, AFL-CIO (HARRAH'S CLUB, *et al.*)

and

NATIONAL ASSOCIATION OF ORCHESTRA LEADERS

Decision and Order

On June 30, 1969, Trial Examiner Robert L. Piper issued his Decision, in the above-entitled proceeding, finding that Respondent had engaged in the unfair labor practices alleged in the complaint and recommending that the complaint be dismissed in its entirety. Thereafter, the Charging Party and Judy Lynn filed exceptions to the Trial Examiner's Decision, and General Counsel and the Intervenor, Harrah's Club, filed exceptions to the Trial Examiner's Decision and supporting briefs. Respondents filed an answering brief, cross-exceptions, and a brief in support of cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions and briefs, and the en-

tire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C. Sep. 30, 1969.

John H. Fanning, Member
Gerald A. Brown, Member
Sam Zagoria, Member

(SEAL) National Labor Relations Board

[1] As we agree with the Trial Examiner that the appeals to Judy Lynn, Gaylord, and Holiday, and George Liberace constituted lawful primary activity, we find it unnecessary to consider whether these individuals were employees or independent contractors.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Cases Nos. 20-CC-771, 20-CC-773

AMERICAN FEDERATION OF MUSICIANS, AFL-CIO; and RENO MUSICIANS PROTECTIVE ASSOCIATION #368, AFL-CIO (HARRAH'S CLUB, ET AL.)

and

NATIONAL ASSOCIATION OF ORCHESTRA LEADERS

Kenneth N. Silbert, Esq., for the General Counsel.

Van Arkel & Kaiser, by *Ronald Rosenberg, Esq.*, of Washington, D. C., for Respondent American Federation of Musicians.

Wirin, Rissman, Okrand & Posner, by *Robert R. Rissman, Esq.*, of Los Angeles, Calif., for Respondent Local 368.

Godfrey P. Smith, Esq., of New York City, for the Charging Party.

Severson, Werson, Berké & Bull, by *Nathan R. Berke, Esq.*, of San Francisco, Calif., for Harrah's Club, an Intervenor.

Trial Examiner's Decision

Statement of the Case

ROBERT L. PIPER, Trial Examiner: This proceeding under Section 10(b) of the National Labor Relations Act, as amended, was heard in Reno, Nevada, on November 25, 26, and 27, 1968,[1] pursuant to due notice. The consolidated complaint, which was issued on August 22, on a charge filed March 5 in Case No. 771 and a charge filed March 13 and

[1] All dates hereinafter refer to 1968 unless otherwise indicated.

amended March 14 and May 29 in Case No. 773, alleged in substance that American Federation of Musicians (hereinafter called AFM) and its Local 368 (hereinafter collectively called Respondents) engaged in unfair labor practices proscribed by Section 8(b)(4)(i) and (ii)(B) of the Act by inducing, encouraging and coercing employees of Judy Lynn, d/b/a The Judy Lynn Show, to engage in a strike or refusal to perform services, and by threatening, coercing or restraining Judy Lynn, Ronnie Gaylord and George Liberace, persons or employers engaged in commerce or in an industry affecting commerce, in both instances with an object of forcing or requiring Lynn and Gaylord to cease doing business with Harrah's Club and Liberace to cease doing business with the Ponderosa Hotel Co., both Nevada corporations engaged in commerce within the meaning of the Act. Respondents' answer denied the alleged unfair labor practices. All counsel filed briefs. The Intervenor's unopposed motion to correct the official transcript of proceedings is hereby granted.[2]

Upon the entire record in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Jurisdictional Findings

Harrah's Club (hereinafter called Harrah's) is a Nevada corporation with places of business in Reno and Lake Tahoe, Nevada, where it is engaged in the operation of gambling casinos and restaurants. During the past year in the course and conduct of its operations Harrah's received gross revenue in excess of $500,000 from its gambling operations and

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[2]

Page	Line	Correction
13	5	Change "regular" to "wrangler"
370	9	Change "status" to "statement"
410	10	Change the first word, "question," to "witness"

purchased and received goods valued in excess of $50,000 directly from outside the State of Nevada. The Ponderosa Hotel Co. (hereinafter called the Ponderosa) is a Nevada corporation with a place of business in Reno, Nevada, where it is engaged in the operation of a gambling casino, restaurant, bar and hotel. During the past year in the course and conduct of its operations the Ponderosa received gross revenue in excess of $500,000 from its gambling operations and purchased and received goods valued in excess of $50,000 directly from outside the State of Nevada. Respondents admit and I find that Harrah's and the Ponderosa are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Judy Lynn, d/b/a The Judy Lynn Show, is a star singer, also engaged in the operation of an orchestra or band which accompanies her. They perform at various hotels, nightclubs, rodeos and other busines establishments throughout the United States. During 1968, Judy Lynn was a party to a contract with Harrah's whereby she agreed to perform services valued in excess of $80,000.

Ronnie Gaylord, a member of an act called Gaylord and Holiday, is an entertainer who performs at various hotels, nightclubs and other business establishments throughout the United States. During 1968, Gaylord was a party to a contract with Harrah's whereby he agreed to perform services valued in excess of $100,000.

George Liberace is the leader of a band or orchestra which performs at various hotels, nightclubs and other business establishments throughout the United States. During 1968, Liberace was a party to a contract with the Ponderosa whereby he agreed to perform services valued in excess of $20,000. The record establishes and I find that Judy Lynn, Gaylord and Liberace are persons and employers engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6), (7) and (8)(b)(4) of the Act.

II. The Labor Organizations Involved

Respondents are labor organizations within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Introduction and Issues*

As a result of a labor dispute, Respondents engaged in a strike from March 1 to April 30 against the various casinos employing musicians in the Reno-Tahoe area, including Harrah's and the Ponderosa. As the result of contracts previously entered into, Judy Lynn and Gaylord and Holiday were scheduled to appear and appeared at Harrah's during the strike, and Liberace was scheduled to appear at the Ponderosa. Judy Lynn, the members of her band, Gaylord and Liberace were all members of Respondent AFM. Respondents, after placing Harrah's and the Ponderosa on their National Unfair List, threatened Judy Lynn, the members of her band, and Gaylord with union disciplinary action and expulsion if they performed or continued to perform services for Harrah's, threatened Liberace with union disciplinary action if he performed services for the Ponderosa, and instituted union disciplinary proceedings against Gaylord, Judy Lynn and the members of her band for continuing to perform services for Harrah's.

The issues as framed by the pleadings are: (1) whether the artists or entertainers involved herein are persons or employers, i.e., independent contractors (which would make their musicians their employees) or employees of the casinos at which they performed; (2) if the entertainers herein are independent contractors and employers, whether Respondents' threats to them and to their employees of expulsion and other disciplinary action for performing services for their contracting clubs, primary employers with whom Respondents had a labor dispute, constitute threatening, coercing or restraining such independent contractors within the meaning of Section 8(b)(4)(ii)(B), and

inducing or encouraging their employees to engage in a strike or a refusal to perform services within the meaning of Section 8(b)(4)(i)(B) of the Act; and (3) if such threats occurred, whether they constituted primary action within the meaning of the proviso to Section 8(b)(4)(B).

B. *Chronology of Events*

The facts in this case are substantially undisputed. On March 1, as the result of a bargaining dispute between the various casinos employing musicians in the Reno-Tahoe area and Local 368, Respondents called a strike against the casinos and placed them on their National Unfair List. As a result of contracts entered into in 1966 and 1967, Judy Lynn and Gaylord and Holiday were scheduled to appear at Harrah's during the course of the strike, and Liberace was scheduled to appear at the Ponderosa. The strike continued until April 30.

Judy Lynn, the members of her hand, which varied from seven to eight, Gaylord and Liberace were all members of AFM but not of Local 368. In furtherance of their strike, Respondents by telegrams, letters and written notices informed each of the above AFM members that Respondents were on strike against the clubs where they were scheduled to appear or were appearing, that such clubs had been placed on AFM's National Unfair List, and threatened them with expulsion from AFM or other disciplinary action if they performed or continued to perform services for the struck clubs. Such warnings included a quotation of or reference to Section 7 of Article X of Respondents' By-Laws, which reads:

> Whenever any person, persons, organization or establishment is declared to be on the National Unfair or Defaulter List by the Federation, members cannot render services for or with such person, persons, organization, or for, or in, such establishment. If members render services for any person, persons, organization

> or establishment declared nationally unfair or in default by the Federation, such action shall constitute grounds for such members' expulsion from membership in the Federation and they can only be reinstated under such conditions as may be imposed upon them by the International Executive Board.

Thereafter, Respondents, as a result of intra-union charges, commenced disciplinary proceedings against Judy Lynn, the members of her band and Gaylord for continuing to perform services for the struck clubs in violation of Respondents' By-Laws. The strike terminated before Liberace's contract services commenced and accordingly he performed no services during the strike. Thereafter, the charges in this proceeding were filed.

As noted above, one of the principal issues litigated was whether the star entertainers involved herein are independent contractors or employees of the respective clubs with which they had contracts. If they were employees of the primary employers with whom Respondents had a labor dispute, the provisions of Section 8(b)(4) obviously would not apply. The record establishes clearly that Judy Lynn, d/b/a The Judy Lynn Show, and Gaylord and Holiday are independent contractors, and that the musicians accompanying them are their employees. Judy Lynn is a singing star, primarily country and western, accompanied by a band of seven or eight musicians, consisting of guitars, fiddles and a set of drums. She employs her musicians on a year-round or permanent basis, paying them an annual salary on a weekly basis whether or not they are performing, furnishes them with annual paid vacations, provides their uniforms costing thousands of dollars, supplies all of the musical instruments except the fiddles, pays all of their traveling expenses, files and pays required employer social security and tax deductions, establishes rules which the members of the band must observe, and hires and fires at will.

She and the band travel nationally and internationally, performing at clubs, hotels, rodeos and the like for short intervals of time ranging from a single day to engagements of several weeks, each covered by a contract negotiated by her business manager or agents, all requiring the payment to her of thousands of dollars a week. In addition, she is a recording, radio and TV star, again customarily accompanied by her band. She also employs an office manager and a personal secretary and maintains a permanent office in Las Vegas, Nevada. She spends thousands of dollars a year on promotional material to enhance the securing of future contracts. Her contracts are for a fixed period of time and the clubs, *et al.*, including Harrah's, have no power to fire her or any members of her band. She alone determines the contents of her act, including the songs to be sung and played. Necessarily, as part of the contractual arrangement the clubs fix the time and site of the performances, and some, specifically Harrah's, reserve the right to censor objectionable or so-called "blue" material. As an entrepreneur, Judy Lynn has annual fixed expenses substantially in excess of $100,000 and capital investments in costumes, instruments and variod equipment also substantially in excess of $100,000.

Gaylord and Holiday are primarily a comedy team, with some singing and dancing, normally accompanied by two musicians whom they employ, one on a permanent year-round basis and the other for each contracted engagement. They operate in much the same manner as Judy Lynn, traveling nationally and appearing in clubs and similar establishments by contract for limited engagements. They employ a personal manager and a conductor on a year-round basis and pay all of their traveling expenses and those of their accompanying musicians. They also expend large sums for promotional material and in general exercise the same attributes of an entrepreneur as found above with respect to Judy Lynn. Their contracts also call for the payment of thousands of dollars per week for their

services. They too independently determine the contents of their act, with the single reservation of the censorship of "blue" material. As part of the contractual arrangement; the clubs necessarily fix the time and site of their appearances.

Respondents throughout their brief characterized Judy Lynn and Gaylord and Holiday as "orchestra leaders," apparently because of Respondents' reliance upon the Board's holding in the *Reno Musicians* case,[3] involving the same local and the house bands permanently employed by the clubs in the Reno-Tahoe area, that the leaders of such house bands or orchestras were employees of the club and not independent contractors. The record herein establishes that Judy Lynn and Gaylord and Holiday are in no sense band or orchestra leaders as that term is used in the industry, but are star entertainers who employ musicians to accompany their acts. Judy Lynn is a singing star and does not lead or direct the band which accompanies her songs. While she is the employer of the musicians in the band, this no more makes her a "band leader" than the clubs which were found to be the employers of the house bands in the *Reno Musicians* case, *supra.* She is a singer accompanied by musicians, much like any other singing star, such as Ella Fitzgerald, Peggy Lee and Dinah Shore, except that her repertoire is primarily country and western. Such other singers are accompanied by musicians customarily employed by the club at which they appear rather than by the star. Miss Lynn's unilateral decision to employ her own musicians in a specialized field on a permanent basis serves as a convenience both for her and the contracting clubs, but does not make her a "band leader" any more than other star singers. Gaylord and Holiday are primarily a comedy team, with occasional singing and dancing, employing two or more musicians to accompany

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[3] *Reno Musicians Protective Union Local 368, AFM, AFL-CIO (Foster S. Edwards),* 170 NLRB No. 56 (1968).

them. Patently they are not "orchestra", or "band leaders" as the term is used in the industry, but are star entertainers accompanied by music.

The situation with respect to Liberace is not as clear, inasmuch as there is no question but that he is a band or orchestra leader as the term is used in the industry. However, he fronts a traveling name band which works for many different clubs throughout the year under contracts such as those entered into by Judy Lynn and Gaylord and Holiday, and employs the same musicians year after year, although engagement by engagement instead of on a permanent basis as Judy Lynn and Gaylord and Holiday. The house bands involved in the *Reno Musicians* case, *supra*, were permanent year-round employees of the clubs, and their leaders were not entrepreneurs with substantial expenses and investments, subject to the risks of loss or profit as the entertainers herein, including Liberace. However, in view of the Board's decision issued June 11, 1969, involving the same strike and the same type of star entertainers, including Gaylord and Holiday, it is unnecessary to determine whether Liberace was an independent contractor or an employee for the reasons stated therein.[4]

The record unquestionably establishes that Respondents threatened Judy Lynn, the members of her band, Gaylord and Liberace, all members of AFM, with expulsion or disciplinary action for performing or continuing to perform services for a primary employer with whom Respondents had a labor dispute. Because of the very recent decision of the Board in the *American Guild of Variety Artists* case,[4a] involving the same strike, the same type of clubs, including Harrah's, the same type of stars, including Gaylord and Holiday, and substantially the same type of union threats of disciplinary action, it is unnecessary to engage in an

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[4] *American Guild of Variety Artists, AFL-CIO (Harrah's Club, et al.)*, 176 NLRB No. 77 (1969).

[4a] *Id.*

extended discussion of the applicable law.[5] In that case, based upon substantially the same factual situation and issues, the Board found that the threats of the union were primary action, in aid of the primary labor dispute between the clubs and Respondents, within the meaning of the proviso covering such primary activity, and thus exempt from the proscriptions of Section 8(b)(4). There, as a result of the same strike considered herein and in support thereof, the American Guild of Variety Artists threatened its members, star entertainers including Gaylord and Holiday appearing at the Reno-Tahoe clubs, including Harrah's, with disciplinary action for not honoring Respondents' picket lines by performing or continuing to perform at the struck clubs, allegedly in violation of Section 8(b)(4)(ii)(B). There is no difference in substance between the activity considered there and that considered here.

The Board, primarily in reliance upon the decisions of the Supreme Court in the *General Electric* and *Carrier* cases,[6] stated:

> We find that Respondent engaged solely in permissible primary activity with respect to the pressures it exerted on all of these entertainers.

In that connection, the Board observed that it was unnecessary to decide whether the star entertainers involved were employees within the meaning of the Act as contended by the respondent therein.

After finding that the union therein threatened its member stars with disciplinary action if they continued to perform at the struck clubs, just as herein, that the work of

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[5] It is well established that decisions of the Board are binding upon its trial examiners, just as decisions of the Supreme Court are binding upon the Board.

[6] *Local 761, IUE* v. *N.L.R.B. (General Electric Company)*, 366 U.S. 667 (1961); *United Steelworkers* v. *N.L.R.B. (Carrier Corporation)*, 376 U.S. 492 (1964).

the stars there involved "not only contributed 'to the operations which the strike was endeavoring to halt' but in fact was directly related to the normal operations of the casinos," because such shows were "an important means of enticing the public to the clubs in the hope and reasonable expectation that . . . they can be induced to try their luck in the casinos," the primary business of the establishments, and that such work was "inextricably involved with and necessary to the normal operation of the casinos," the Board in reliance upon the decisions of the Supreme Court in *General Electric* and *Carrier, supra,* held that inducing such action "only at the situs of the dispute by persons 'contributing to the operations which the strike was endeavoring to halt'" constituted traditional primary activity outside the scope of Section 8(b)(4).[7]

The Board further observed:

> We reject the apparent view of the Trial Examiner and theory of the General Counsel that, because the star entertainers are independent contractors, rather than employees, appeals to them to honor a picket line lose their character as permissible primary activity when accompanied by threats of internal disciplinary action by the Union of which they are members.

The finding of primary activity necessarily applies to the employees of such independent contractors.

Accordingly, I conclude and find that the General Counsel has failed to sustain his burden of proving that Respondents have induced or encouraged employees in violation of Section 8(b)(4)(i)(B), or threatened, coerced or restrained persons or employers in violation of Section 8(b)(4)(ii)(B).

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

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[7] *United Steelworkers* v. *N.L.R.B. (Carrier Corporation)*, 376 U.S. 492, 499 (1964).

Conclusions of Law

1. Harrah's and the Ponderosa are employers engaged in commerce within the meaning of the Act.

2. Judy Lynn and Ronnie Gaylord are persons and employers engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) and 8(b)(4) of the Act.

3. Respondents are labor organizations within the meaning of the Act.

4. Respondents have not, as alleged in the complaint, induced or encouraged employees to engage in a strike or a refusal to perform services within the meaning of Section 8(b)(4)(i)(B) of the Act, or threatened, coerced or restrained persons or employers within the meaning of Section 8(b)(4)(ii)(B) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following:

Recommended Order

It is hereby ordered that the complaint herein be, and it hereby is, dismissed.

Dated:

/s/ Robert L. Piper
Robert L. Piper
Trial Examiner

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-261

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AFL-CIO,
and
AMERICAN GUILD OF VARIETY ARTISTS,
Petitioners,

vs.

HARRAH'S CLUB, INC.,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Respondent Harrah's Club, Inc. in Opposition

NATHAN R. BERKE
433 California Street
San Francisco, California
Counsel for Respondent Harrah's Club, Inc.

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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IN THE

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AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AFL-CIO,
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AMERICAN GUILD OF VARIETY ARTISTS,
Petitioners,

vs.

HARRAH'S CLUB, INC.,
and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Respondent Harrah's Club, Inc. in Opposition

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported. It appears in the Petition, Appendix A, pp. 1a-17a. The Decision and Order of the Board and the Decision

and Recommended Order of the Trial Examiner in the case involving Petitioner, American Guild of Variety Artists, is reported at 176 N.L.R.B. No. 77. The Decision and Order of the Board and the Decision and Recommended Order of the Trial Examiner in the case involving Petitioner, American Federation of Musicians of the United States and Canada, AFL-CIO, is reported at 178 N.L.R.B. No. 115.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether artists, pursuant to individual contracts, entertaining on a short-term basis at clubs, and such artists having control over the contents and means of presenting their particular performances, are independent contractors.

2. Whether a demand by a musician's local union and the federation with which the local is affiliated, that such independent contractors who belong to another local cease performing for such clubs and that the employees of such independent contractors cease rendering service under threats that such independent contractors and their employees' failure to obey such demands will subject them to fines, expulsion and/or other disciplinary action, constitute threats, coercion or restraint of such independent contractors within the meaning of Section 8(b)(4)(ii)(B) of the National Labor Relations Act, and inducement or encouragement of the employees of such independent contractors to engage in a strike or a refusal to perform services within the meaning of Section 8(b)(4)(i)(B) of the said Act.

3. Whether, in the case of Petitioner, American Guild of Variety Artists, which was not involved in the primary dispute, a demand by that union to the independent contractor artists who are members of that union to cease performing for such clubs or be subject to fines and/or expulsion constitutes a threat or coercion within the meaning of Section 8(b)(4)(ii)(B) of the said Act.

4. Whether such independent contractor artists are neutral persons with respect to a labor dispute between the clubs at which they perform and another union of which they are not members.

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act 1947, as amended [29 U.S.C. § 158(b)(4)(i) and (ii)(B)] are set forth in the Petition at pp. 3-4.

STATEMENT OF THE CASE

A. The Trial Examiner's Decision and the Board's Decisions and Orders

The cases involving the two petitioners were tried separately before two different trial examiners. The Board determined them separately.[1]

(1) The American Guild of Variety Artists Case

The case of the American Guild of Variety Artists (AGVA) was tried first. The Trial Examiner found and concluded that the clubs involved, Harrah's and Sparks Nugget, Inc., were engaged in commerce within the meaning of the Act; that each of the artists involved were independent contractors in their relationship with the clubs, and that they were persons or employers within the meaning of Section 2(6) and (7) and 8(b)(4) of the National Labor Relations Act. He further found and concluded that AGVA had, by its telegrams, threatened, restrained and coerced these artists with fines, censure, suspension or expulsion, an object thereof being to force or require them to cease doing business with Harrah's and Sparks Nugget, Inc., in violation of Section 8(b)(4)(ii)(B) of the Act. The Trial Examiner recommended that the Board order AGVA to cease and desist from

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1. The case involving the musician's unions included both the American Federation of Musicians and Reno Musicians Protective Association No. 368. The latter has not petitioned for a writ of certiorari and, therefore, raises no issue concerning the decision of the Court below. Neither has the Solicitor General filed a petition, hence the Board is also bound by the decision below. *Ryerson v. U.S.* (1941), 312 U.S. 405, 61 S.Ct. 656; *LeTulle v. Scofield* (1940) 308 U.S. 415, 60 S.Ct. 313.

threatening, coercing or restraining the artists, or any other person engaged in commerce or in an industry affecting commerce, for an object of forcing or requiring said artists or said person to cease doing business with Harrah's or Sparks Nugget and to post appropriate notices. (Petition, pp. 23a-37a)

Upon exceptions, the Board concluded, contrary to the Trial Examiner, that AGVA's action in sending the telegrams to the artists called for nothing more than a refusal to cross the picket lines of the striking musicians and that such action by AGVA constituted permissible primary activity. The Board did not deal with the question of whether the artists were independent contractors, stating "in view of our disposition of the issues raised by the allegations of the complaint, *infra*, we deem it unnecessary to decide whether any of the star entertainers involved herein, or all of them . . . are employees within the meaning of Section 2(3) of the Act. . . ." (Petition, p. 19a, ftn. 1) The Board further concluded that the performances of the artists were inextricably involved with and necessary to the normal operations of the casinos of the clubs and dismissed the complaint in its entirety. (Petition, pp. 21a-22a)

2. The American Federation of Musicians Case

In this case, which was tried after the AGVA case, the Trial Examiner found and concluded that Harrah's and the Ponderosa Hotel Co. were each engaged in commerce within the meaning of the Act; that the artists there involved were independent contractors and that the musicians accompanying these artists were employees of these artists; that the artists were persons and employers engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) and 8(b)(4) of the Act. He further found and concluded that the record unquestionably established that the American Federation of Musicians and the Reno Musicians Protective Association No. 368 had threatened the artists and their employees with expulsion or disciplinary action for performing or continuing to perform

services for a primary employee with whom those two unions had a labor dispute.

Since he decided the case after the Board had rendered its decision in AGVA, the Trial Examiner felt bound thereby, and recommended dismissal of the complaint. (Petition, pp. 41a-52a)

Upon exceptions by the General Counsel of the Board and Harrah's the Board adopted the findings, conclusions and recommendations of the Trial Examiner, except that differently than the Trial Examiner, the Board found it "unnecessary to consider whether these individuals were employees or independent contractors." (Petition, p. 40a, ftn. 1)

B. The Decision of the Court Below

Harrah's, as the intervenor in the Board proceedings, petitioned for review of both decisions by the Board in the Court of Appeals for the Ninth Circuit. That Court, in a thorough opinion reviewing all of the evidence and after full consideration of the applicable statutory and decisional law, concluded, as did the Trial Examiners, that the artists were independent contractors, that they were neutral persons within the meaning of the Act, and that the telegrams to both the artists and the employees of the artists, subjecting them to fines, expulsions or other disciplinary action if they did not obey the demands of the petitioners, "were clearly intended to and did threaten, coerce, and restrain an employer where 'an object' thereof was to force or require that employer to cease doing business with Harrah's. . . ." (Petition, p. 11a)

Contrary to the oblique statement in the Petition (p. 6, ftn. 7), the record did not establish that the entertainment brought patrons into gamble and "thus providing revenue to the casinos." The record disclosed that Harrah's engaged in business at Reno and Stateline [Tahoe], Nevada where it operated restaurants, bars and gambling casinos (R. 6-7, 13, 38; Tr. 8-9). Their primary source of income is from the operation of the gambling casinos. They also provide other services, including top-name entertain-

ment and dining facilities. There is no requirement that persons dining in the restaurants or watching the entertainment must also use the gambling facilities in the casinos. The artists perform at Harrah's in either the South Shore Room or Lounge at Stateline or the Headliner Room or Lounge at Reno. Artists perform at the Sparks Nugget in the Circus Room. These rooms are physically isolated from the casinos so that persons using the gambling facilities cannot simultaneously watch the entertainment in these rooms. The Lounges are located in the casino area and entertainers performing in the lounges can be seen from some parts of the casino (Tr. 70, 167). The gambling facilities, and certain of the restaurants, operate 24 hours a day whether or not there is entertainment in the South Shore Room, or the Headliner Room, or the Circus Room. Entertainment in these rooms is generally limited to between the hours of 8:00 p.m. and midnight (Tr. 75-76, 167-168).

ARGUMENT

The issue in this case is uniquely narrow and involves a question of fact, which no amount of strained semantics or improper injection of a non-existent constitutional question can convert it into one warranting review by this Court.

We are here concerned with one real issue, i.e., whether unions which threaten and coerce neutral employers and the employees of those neutral employers by threats of fines, expulsion or other disciplinary action, with an admitted object of forcing or requiring such neutral employers to cease performing services for the primary employer with which one of the unions has a dispute, are in violation of the National Labor Relations Act.

These cases do not in any sense involve a determination of a federal question in a way in conflict with applicable decisions of this Court; nor does it present an issue of general importance. The facts in these cases disclose a typical and classical secondary boycott situation. It grew out of a dispute between the Reno Musicians Protective Association No. 368, which has not petitioned for

certiorari, and Harrah's and the Sparks Nugget, which resulted in Local No. 368 placing pickets at the clubs. Local No. 368 enlisted the aid of the AFM and AGVA. The action taken by these unions against the independent contractor artists and their employees has been delineated above.

The record, on the issue of whether these artists are independent contractors, is clear and overwhelming in establishing that they are such. These entertainers, referred to in the entertainment industry as "stars," such as Tennessee Ernie Ford, Dinah Shore, Sid Caesar, Judy Lynn, et al., perform in various parts of the world and in various places and media, such as television, films, nightclubs, coliseums, rodeos, et cetera. They have their own staffs, their own managers, and even their own press agents. They maintain offices, and some of the stars are incorporated. They decide what their performances will be and how it will be presented. They select their own material and music. They hire their own employees, including musicians. They maintain their own payrolls, make the usual withholding tax and other deductions, and pay the required employer's taxes (R. 42-43; Tr. 10-13, 13-23, 26-28, 31-42, 48-54, 64-65, 69-70, 316-323, 330-332, 342-345, 352).[2]

The issue here does not involve the proviso to Section 8(b)(4)(B). This was not an issue which the Board decided, nor was it raised in the Court below. As the Court below stated, the question of whether the primary picketing was unlawful was not involved in the Board proceedings, nor was there any attack on the picketing itself in the matter before the Court (Petition, p. 11a).

What has here happened, and as the Solicitor General apparently recognized, the Board reached its determination on an

2. The references are to the situation concerning Judy Lynn which, as the record shows, is representative of the situation with respect to the other artists. Not to make this brief unduly prolix, we have refrained from setting forth the numerous record and transcript references with respect to the others.

erroneous reading and misapplication of this Court's opinions in *General Electric*[3] and *Carrier*[4] to the facts in the instant cases.

On the facts here, the decision of the Court below was manifestly correct. There is no conflict with any decisions of this Court. On the contrary, the decision of the Court below is in harmony with the decisions of this Court. *N.L.R.B. v. Local 825, International U. of Operating Eng.* (1971), 400 U.S. 297, 91 S.Ct. 402, 406-407, in which this Court distinguished the *General Electric* and *Carrier* cases. See also, *National Labor Rel. Bd. v. Denver Bldg. & Const. Tr. C.* (1951) 341 U.S. 675.

Neither is there any First Amendment nor any other constitutional issue involved, nor any important question of Federal law requiring decision by this Court.

I

THE DECISION BELOW IS CLEARLY CORRECT

Substantial evidence on the record as a whole supports the findings and conclusions of both the Trial Examiners and the Court below, that the artists are independent contractors and that the musicians accompanying these artists are their employees.[5]

With respect to independent contractors, this Court, in *N.L.R.B. v. United Insurance Company of America* (1968) 390 U.S. 254, 256, 88 S.Ct. 988, 989-990, said:

> "...Congress passed an amendment specifically excluding any individual having the status of an independent contrac-

3. 366 U.S. 677.
4. 376 U.S. 492.
5. In the Petition (p. 6, ftn. 8), it is stated that the Board in another case, *Reno Musicians Local 368*, 170 N.L.R.B. No. 56, decided that the clubs and not the orchestra leaders employed the musicians. The Board there dealt with so-called house bands and did not deal with or decide that the clubs were the employees of the sidemen (musicians). The Board dealt only with and held that the orchestra leader of the house band was an employee of the club. In a case similar to the instant cases, the Board held the entertainers to be independent contractors and not employees of the symphony which had engaged their services. The Board also found the union involved to have violated 8(b)(4)(ii)(B). *American Guild of Musical Artists, AFL-CIO*, 157 N.L.R.B. 735, 740-742.

> tor' from the definition of 'employee' contained in § 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."

Applying the general agency principles to the facts here developed, it is crystal clear that both the Trial Examiners and the Court below were correct in finding the artists to be independent contractors. Petitioners do not appear to be questioning this determination by the Court below.

This, then, leads us to what transpired, which brought petitioners afoul of the Act.

Although not directly involved in the primary dispute, AGVA sent telegrams to those of its members who were performing or had agreed, pursuant to contract, to perform at the clubs involved. Tennessee Ernie Ford, Sid Caesar and Gaylord and Holiday were sent telegrams by a national officer of AGVA reading:

> "This is official notice that the AGVA National Board has voted to approve the AFM strike and to honor the AFM picket lines in Reno and Tahoe. You are therefore advised that, according to AGVA Constitution, you are not to perform in any of the Reno-Tahoe establishments where AFM is on strike."

Dinah Shore and Ford were also sent telegrams by the San Francisco Branch Manager of AGVA. The one to Shore stated:

> "AGVA National advisors are not to perform at any Reno-Tahoe establish presently strick AFM or they are in violation of AGVA Constitution."[6]

The one to Ford stated:

> "AGVA National advises no acts are to perform at any Reno-Tahoe establishment presently struck by AFM or they are in violation of AGVA Constitution."

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6. Errors in the original. For telegrams, see Petition, p. 2a, ftn. 1.

As stated in the petition (p. 5, ftn. 4), failure to heed the orders in the telegrams would subject these independent contractors to various actions by the union, including fines, suspension, censure or expulsion. For disciplinary provisions in AGVA's Constitution and By-Laws, see Petition, page 3a, note 2.

With respect to the AFM, it sent telegrams, letters and notices to those independent contractor artists and their employees who were members of the AFM informing them of the existence of the dispute and of the placing of the clubs on both the AFM and the Local's unfair list and ordering them to cease their services to the struck clubs, even though neither these artists nor their employees were members of the Local which was involved in the primary dispute. These telegrams, letters and notices called attention to the AFM's By-Laws, which provided that any member who performed services for any person, organization or establishment placed on the national unfair list shall be subject to expulsion and that "they can only be reinstated under such conditions as may be imposed upon them by the International Executive Board." (Petition, pp. 4a-5a and ftn. 3).

As the Court below points out, not only were these threatening telegrams, letters and notices sent, but disciplinary action was taken against those neutral employers who did not cease to render services to the struck clubs. Such action was taken against two members of the AFM, Judy Lynn and Ronnie Gaylord. Also, disciplinary action was taken against Judy Lynn's employees (Petition, p. 5a).

We thus have here a typical case of secondary boycott activity through threats and coercion of not only the neutral employers and their employees, but actual carrying out of the threats through disciplinary proceedings. Admittedly, an object of such threats and coercive conduct was to force and require the neutral employers to cease doing business with the clubs and to induce and encourage the employees of such neutral employers to engage in a strike or a refusal to perform services. These acts and conduct, as rightfully found by the Trial Examiner in the AGVA case, and as found by

the Court below in both cases, constitute violations of Section 8(b)(4)(i) and (ii)(B) of the Act.

II

THERE IS NO CONFLICT WITH DECISIONS OF THIS OR ANY OTHER COURT

In their "questions presented," petitioners do not assert any conflict of decisions. In their "reasons for granting the writ," they claim a conflict with principles announced in decisions of this Court and with decisions of three other courts of appeals.

This does not comply with the rules of this Court. Rule 23.1(c), dealing with questions presented for review, in its pertinent part, states: ". . . only the questions set forth in the petition or fairly comprised therein will be considered by the court." Neither of the two questions presented deal with any alleged issue of conflict with the decisions of this or any other court, nor can it be said that such issue is fairly comprised in the questions presented (Petition, p. 3).

We, therefore, urge the Court not to consider the alleged issue of conflict of decisions.

In dealing with the question of whether the *General Electric* and *Carrier* decisions were controlling in light of the facts in the instant cases, the Court below did a thorough analysis of those cases in the context of the factual situation prevailing here. The Court below also dealt with other decisions of this Court pertaining to secondary boycotts. As it pointed out, this Court held, in considering the secondary boycott amendments of 1959, that Congress intended the secondary boycott to reach secondary employers as well as employees. Also, as the Court below observed, this Court held that threats directed to a secondary employer are encompassed within the secondary boycott proscription. *N.L.R.B. v. Servette, Inc.* (1964) 377 U.S. 46, 84 S.Ct. 1098. (Petition, pp. 9a-10a)

The analysis and distinguishing factual situation in *General Electric* and *Carrier* by the Court below are found in the Petition at pages 15a-16a. We shall not burden this brief or the Court with repeating them here. As the Court concluded, "we do not find those cases controlling in this fact situation."

Petitioners, whether designedly or otherwise, skirt the fact that the telegrams, letters and notices contained threats if the demands therein were not complied with by those to whom they were sent. In the first of the two questions presented and throughout their petition, they seek to make it appear that some innocuous telegram or notice was sent. As mentioned, these referred to provisions in the Constitutions and By-Laws of the unions. Why was it necessary to make such references if there were no threats intended. The persons to whom they were sent are not only knowledgeable but also rather sophisticated. They did not need to have an interpreter to know what the unions meant when they referred to their Constitutions and By-Laws. That these were not just polite "peaceful" communications is made quite clear by the disciplinary proceedings taken against two of the neutral employers and against employees. Who is seeking to deceive whom? And why?

Manifestly, under the facts, there were violations by petitioners of Sections 8(b)(4)(i) and (ii)(B). Manifestly, too, under the facts, the Court was correct in concluding that *General Electric* and *Carrier* were not applicable. As this Court stated in the recent case of *N.L.R.B. v. Local 825, International U. of Operating Eng., supra.* (406-207):

> "Congressional concern over the involvement of third parties in labor disputes not their own prompted § 8(b)(4)(B). This concern was focused on 'secondary boycotts,' which was conceived of as pressure brought to bear not 'upon the employer who alone is a party [to a dispute]. but upon some third party who has no concern in it' with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands.
>
> "Section 8(b)(4)(B) is, however, the product of legislative compromise and also reflects a concern with protecting labor organizations' right to exert legitimate pressure aimed at the employer with whom there is a primary dispute. This primary activity is protected even though it may seriously affect neutral third parties. United Steelworkers of America, AFL-CIO (Carrier Corp.) v. NLRB, 376 U.S. 492, 502, 84 S.Ct. 899, 905, 11 L.Ed.2d 863 (1964); Union of Local 761, Interna-

tional Electrical, Radio and Machine Workers, AFL-CIO (General Electric) v. N.L.R.B., 366 U.S. 667, 673, 81 S.Ct. 1285, 1289, 6 L.Ed.2d 592 (1961).

"Thus there are two threads to § 8(b)(4)(B) that require disputed conduct to be classified as either 'primary' or 'secondary'. And the tapestry that has been woven in classifying such conduct is among the labor law's most intricate. See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969). But here the normally difficult task of classifying union conduct is easy. As the Court of Appeals said, 'the record amply justifies the conclusion that [Burns and the neutral subcontractors] were subjected to coercion in the form of threats or walkouts, or both.' 410 F.2d, at 9. And as the Board said, it is clear that this coercion was designed to 'achieve the assignment of [the] disputed work' to operating engineers. 162 N.L.R.B., at 1621.

"Local 825's coercive activity was aimed directly at Burns and the subcontractors that were not involved in the dispute. The union engaged in a strike against these neutral employers for the specific, overt purpose of forcing them to put pressure on White to assign the job of operating the welding machine to operating engineers. Local 825 was not attempting to apply the full force of primary action by directing its efforts at all phases of Burns' normal operation as was the case in United Steelworkers of America, AFL-CIO (Carrier) v. NLRB, 376 U.S. 492, 84 S.Ct. 899, 11 L.Ed.2d 863 (1964) and Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO (General Electric) v. NLRB, 366 U.S. 677, 81 S.Ct. 1291, 6 L.Ed.2d 592 (1961). It was instead using a sort of pressure that was unmistakably and flagrantly secondary. National Labor Relations Board v. Denver Building & Construction Trades Council, 341 U.S. 675, 71 S.Ct. 943, 95 L.Ed. 1284 (1951)."

It is to be noted that this Court distinguished *General Electric* and *Carrier* and said that the union was not attempting to apply the full force of primary action by directing its efforts at all phases of the primary employer's normal operation, but instead by coercion and threats using "a sort of pressure that was unmis-

takably and flagrantly secondary." There the neutral employers were subjected to threats. So, too, in the instant case. Not only, as mentioned, were there threats in the instant case, but there was even more coercive action. Disciplinary proceedings were taken against the secondary employers and employees.

Petitioners argue that the fact that the Solicitor General was requested by the Board to apply for certiorari is evidence that review by this Court is necessary. The fact is that after studying the record, the Solicitor General concluded against making application for certiorari. Petitioners state they have been advised that the Solicitor General agreed with the Board that the decision below was erroneous. We question that "advise." Since there is indulgence in such argument, we have been advised that the members of the staff of the General Counsel disagreed with the Board. We also are advised that two of the three Board members who made up the panel which decided the cases are no longer members. Obviously, the then General Counsel of the Board was of the opinion that the petitioners were in violation of the Act, for he issued the complaint against them.

In a footnote (Petition, p. 17, n. 17), petitioners equate this case with the situation in *United Steelworkers v. N.L.R.B.*, 376 U. S. 492. There the Solicitor General concluded "that other cases were entitled to priority in selecting the limited number of cases which the government [could] properly ask this Court to review." That is not the situation here. Petitioners appear to be "desperate men resorting to desperate measures," when they urge such argument here as a basis for review.[7]

III

THERE IS NO CONSTITUTIONAL QUESTION INVOLVED

Petitioners claim there is a First Amendment issue. There is none, and petitioners asserted no such issue either before the

7. In his application to this Court for an extension of time, the Solicitor General stated, *inter alia*, that he required additional time in order to complete his study of the Board's request. His study apparently led him to conclude against seeking certiorari.

Board or in the Court below. Petitioners are in no position to advance such argument now. *Adickes v. S. H. Kress & Co.* (1970) 398 U.S. 144, 90 S.Ct. 1598; *State v. Taylor* (1957) 353 U.S. 553, 77 S.Ct. 1037, 1039.

Moreover, to assert at this late point in the history of the National Labor Relations Act that telegrams, letters and notices containing threats to secondary employers and employees abridges free speech, casts even greater doubt on the quality of petitioners' position and demonstrates the complete lack of merit thereof. Can it be said that petitioners are contending that the media by which threats are made governs their protection under the Federal Constitution? This is what they appear to be saying. We submit that threats made in writing are just as violative of the Act as are those made orally. Under petitioners' theory, the very heart of the Act would be excised. Unions would then be left to engage with impunity in all sorts of threats and coercive conduct against not only secondary employers and employees of such employers, but against all employees.[8] Employers will be equally free to resort to threats. Labor management relations instead of being stabilized would become chaotic.

We are not here dealing with peaceful picketing or a broad ban against such picketing, which is the argument petitioners rely upon. We are here concerned with threats and action taken against secondary employers and their employees. We are here dealing with action by unions to involve neutral employers in a primary dispute. As the Court below pointed out, and as did this Court in *N.L.R.B. v. Local 825, International U. of Operating Eng., supra*, the basic justification for banning secondary boycotts is to protect neutral employers and their employees, "not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer" (S.

8. If the First Amendment is applicable to threats against secondary employers and their employees, it would be equally applicable to threats against all employees.

Rep. No. 187, 86th Cong., 1st Sess. (1959), U.S. Code Cong. & Admin. News (1959) at 2382).

This Court has dealt with the free speech issue concerning the secondary boycott proscriptions both before and after the 1959 amendments. In *International Brotherhood v. National Labor Rel. Bd.* (1951) 341 U.S. 694, 71 S.Ct. 954, it was held that "the prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) carries no unconstitutional abridgement of free speech." *N.L.R.B. v. Servette, Inc., supra,* in which this Court pointed out that the 1959 amendments did not expand the type of conduct which § 8(b)(4)(A) condemned, "that is, union pressure calculated to induce the employees of a secondary employer to withhold their services in order to force their employer to cease dealing with the primary employer." This Court went on to state (377 U.S. 53-54, 84 S.Ct. 1103-1104):

> "Moreover, the division of § 8(b)(4) into subsections (i) and (ii) by the 1959 amendments has direct relevance to the issue presented by this case. It had been held that § 8(b)(4)(A) did not reach threats of labor trouble made to the secondary employer himself. Congress decided that such conduct should be made unlawful, but only when it amounted to conduct which 'threaten[s], coerce[s], or restrain[s] any persons; hence the addition of subsection (ii) . . . . Harmony between (i) and (ii) is best achieved by construing (i) to prohibit inducement of the managers to withhold their services from their employer, and subsection (ii) to condemn an attempt to induce the exercise of discretion only if the inducement would 'threaten, coerce, or restrain' that exercise."

It cannot be gainsaid that petitioners by their telegrams, letters and notices threatened, coerced and restrained the secondary employers and induced and encouraged the employees of such secondary employers to engage in a strike or a refusal to perform services. These telegrams, letters and notices, as previously shown,

threatened disciplinary action if the demands were not acceded to. Although such threats in themselves were violative of the Act, petitioner AFM went beyond and instituted disciplinary proceedings against two of the secondary employers and against the employees of one of them.[9]

IV

CONCLUSION

In the light of the facts in this case, and for the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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San Francisco, California
Counsel for Respondent
Harrah's Club, Inc.

September 17, 1971.

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9. As mentioned previously, the secondary employers against whom such proceedings were brought were Judy Lynn and Ronnie Gaylord. The secondary employees were all of the members of Judy Lynn's band.

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No. 71-261

In the Supreme Court of the United States

OCTOBER TERM, 1971

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA, AFL-CIO, ET AL., PETITIONERS

v.

HARRAH'S CLUB, INC. and NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

In March 1968, the "house" musicians employed by a group of casinos in Reno, Nevada, who were represented by a local of petitioner American Federation of Musicians (AFM), struck and established picket lines in front of the casinos. The AFM—by telegrams and other written notices—advised its members not to perform at the struck casinos, and

warned that they were subject to disciplinary action if they did. In support of the AFM strike, petitioner American Guild of Variety Artists (AGVA) sent similar notices and warnings to its members. Members of both unions worked at the casinos as entertainers. The Board found that the unions' action constituted permissible primary activity and dismissed the complaints alleging that the unions had violated Section 8(b)(4)(B) of the National Labor Relations Act (29 U.S.C. 158(b)(4)(B)). (Pet. App. 18a-38a, 39a-52a.) The Board found that the work of the entertainers was "inextricably involved with and necessary to the normal operations of the casinos," and that, in inducing its members to honor the picket lines at the casinos, the unions had "appealed for and induced action only at the situs of the [primary] dispute" (Pet. App. 21a-22a).

The court of appeals reversed the Board. The court held that the unions had threatened, coerced, and restrained the entertainers, who were secondary employers, in order to force them to cease doing business with the casinos, and thus had engaged in conduct proscribed by the "plain language" of Section 8(b)(4)(B) (Pet. App. 13a, 16a).[1] Nor, in the court's view, was this conduct saved by the proviso to that section privileging "any primary strike or primary picketing." The court stated: "The complaint here is addressed to the lawfulness of coercion of employers directly by sending threatening tele-

[1] The court also held that AFM had unlawfully restrained the employees of one of the entertainers (Pet. App. 17a).

grams to them. No question is raised about the mechanics of the primary picketing" (Pet. App. 15a-16a).

For the reasons set forth in its Decision and Order (Pet. App. 18a-28a), the Board believes that the court of appeals erred in concluding that the unions' conduct violated Section 8(b)(4)(B) of the Act. The Board did not file a petition for a writ of certiorari, however, because it was the judgment of the Solicitor General that, since labor-management relations in the entertainment industry are somewhat unique, the present case presents an inappropriate vehicle for seeking further clarification of the difficult line between lawful primary, and unlawful secondary, activity. Although the Board believes that the petition for a writ of certiorari should be granted, it is the position of the Solicitor General that it should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

SEPTEMBER 1971.

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AND

AMERICAN GUILD OF VARIETY ARTISTS, *Petitioners,*

v.

HARRAH'S CLUB, INC.,

AND

NATIONAL LABOR RELATIONS BOARD, *Respondents.*

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AND

NATIONAL LABOR RELATIONS BOARD, *Respondents.*

REPLY OF PETITIONERS AFM & AGVA

The responses to the Petition make clear that review is necessary. Thus, the Labor Board, whose views are entitled to great weight since it is charged with primary responsibility for the administration of the Act, urges in its Memorandum that the writ be granted. The Solicitor General, on the other hand, expresses the view that this Court might be unable to clarify "the

difficult line between lawful primary, and unlawful secondary, activity" by reason of the "somewhat unique" nature of labor-management relations in the entertainment industry. The Solicitor General does not dispute the Petitioners' contentions and the Board's apparent concurrence therein that the decision below (1) is in conflict with decisions of this Court and of other courts of appeals, (2) will have widespread, immediate and adverse impact upon the right to strike, and (3) interprets § 8(b)(4) in such a way as to bring it in collision with the First Amendment.

We agree with the Solicitor General that the line between lawful primary and unlawful secondary activity is a difficult one. But the drawing of that line ultimately rests with this Court and the very complexity of the issues involved here requires the decisive resolution that only this Court can provide. The need for review is accentuated when, as here, the questions decided by the lower court are of a type that constantly arise and the administrative agency vested with the obligation to answer those recurring questions considers the guidance of this Court necessary.

The stated reason for the Solicitor's disagreement with the Board as to the need for review is simply untenable since the unexplained "somewhat unique" nature of labor relations in the entertainment industry is irrelevant to the issues for which certiorari has been requested. Rather, as the Board's decision makes clear, the conduct declared unlawful by the court below is typical in labor-management relations without regard to the industry involved—a strike of an employer's establishment and an attempt to prevent alleged secondaries from entering his premises to aid him in the

conduct of his normal operations. Thus, in support of its decision that the conduct was lawful, the Board cited earlier cases involving the newspaper, shipping, oil and transportation industries, in each of which the same question had arisen. See Decision of National Labor Relations Board, reprinted at 20 a, n. 4 of the Petition. Indeed, Respondent Harrah's Club describes the case as "a typical and classical secondary boycott situation." *Brief for Respondent Harrah's Club in Opposition,* p. 6.

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